(1)

Supreme Court, U.S.
FILED

981986 JUN 10 1999

OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

AMERICAN AUTOMATIC SPRINKER SYSTEMS, INC.

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

3698

QUESTIONS PRESENTED

1. On the strength of this Court's decision in Local 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) construing National Labor Relations Act §10(b), the National Labor Relations Board has adopted a preclusive rule against delayed attacks on continuing collective bargaining systems through the raising of an untimely defense that the initial NLRA §9(a) recognition agreement was invalid.

The first question presented here -- as to which there is a conflict between the Tenth and Eleventh Circuits and the Fourth Circuit -- is whether this rule of preclusion is valid in the construction industry context.

2. Whether the Fourth Circuit erred in determining for itself in the first instance that a §9(a) recognition agreement is invalid on the ground that, in the Court of Appeal's judgment, the union's proffer to the employer showing majority support was an inadequate showing in that regard.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES. v

PETITION FOR A WRIT OF CERTIORARI 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 28

TABLE OF CITED AUTHORITIES

CASES: Page

Ace-Alkire Freight Lines v. NLRB, 431 F.2d 280 (8th Cir. 1970) 24

Auciello Iron Works, Inc. v. NLRB, 517 U.S. 790 (1996) 19

Bear Creek Construction Co., 135 NLRB 1285 22

Brooks v. NLRB, 348 U.S. 96 (1954) 19

Camp v. Pitts, 411 U.S. 138 (1973) 26

Carmichael Construction Co., 258 NLRB 226 (1981), *enf'd*, 728 F.2d 1137 (8th Cir. 1984) 23

Clement Bros., 165 NLRB 698 (1967), *enf'd*, 407 F.2d 1027 (5th Cir. 1969) 22

Couch Electric Co., 143 NLRB 662 (1963) 22

Daisy's Originals of Miami, Inc. v. NLRB, 468 F.2d 493 (5th Cir. 1972) 11

Decorative Floors, Inc., 315 NLRB 188 (1994) 16, 21

Edwards & Webb Construction Co., 207 NLRB 614 (1973) 22

Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985) .. 27

Florida Automatic Sprinkler Contractors, Inc., 199 NLRB 1151 (1972) 22

Florsheim Shoe Store Co. v. NLRB, 565 F.2d 1240 (2d Cir. 1977) 24

Freeman G. Gaffney, 205 NLRB 1012 (1973), *enf'd*, 506 F.2d 1052 (3d Cir. 1974) 22

Garment Workers v. NLRB, 366 U.S. 731 (1961). 5

Golden West Electric, 307 NLRB 1494 (1992) 21

Great Southern Construction, Inc., 266 NLRB 364 (1983) ... 21

Hayman Electric System, 314 NLRB 879 (1994) 16, 21

Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3rd Cir.), *cert. denied*, 488 U.S. 889 (1988) 5

John Deklewa & Sons, 282 NLRB 1375 (1987) ..... *passim*

Kleek & Co., Inc., 88 NLRB 785 (1950), *enf'd*, 189 F.2d 516 (2d Cir 1951). 24

Komatz Construction Inc., 191 NLRB 846 (1971), *enf'd in part*, 458 F.2d 317 (8th Cir. 1972) 22

Local 60 Carpenters v. Labor Board, 365 U.S. 651 (1961) ... 25

Local Lodge 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) ..... *passim*

Lowery Trucking Co., 177 NLRB 13 (1969) 24

McNeff, Inc. v. Todd, 461 U.S. 260 (1983) 20

MFP Fire Protection v. NLRB, 101 F.3d 1341 (10th Cir. 1996) 11

NLRB v. Brower's Moving & Storage, 914 F.2d 239 (2d Cir. 1990), *affirming without opinion* 297 NLRB 207 (1989). 11

NLRB v. Dist. 30, UMW, 422 F.2d 115 (6th Cir. 1969), *cert. denied*, 393 U.S. 959 (1970 11

NLRB v. E.L. Rice & Co., 524 F.2d 1148 (6th Cir. 1975) 23

NLRB v. Gissell Packing Co. Inc., 395 U.S. 575 (1996) 21

NLRB v. Goodless Elec. Co., Inc., 124 F.3d 322 (1st Cir. 1997). 11

NLRB v. Local 103 Iron Workers (Higdon Const. Co.), 434 U.S. 335 (1978) 20

NLRB v. Retail Clerks Local 588 F.2d 984 (9th Cir. 1978) 24

NLRB v. Traignew, Inc., 470 F.2d 669 (9th Cir. 1972) 11

NLRB v. Triple A Fire Protection, 136 F.3d 727 (11th Cir. *1998), cert. denied,* 119 S.Ct. 795 (1999) 11

NLRB v. Viola Industries-Elevator Div., Inc., 979 F.2d 1384 (1992) 11

Pacific Erectors, Inc., 256 NLRB 421 (1981), *enf'd*,718 F.2d 1459 (9th Cir. 1983) 22

Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476 (3d Cir. 1980) 11

Raley's, Inc. 227 NLRB 670 (1976), *enf'd sub nom, Royal Coach Lines v. NLRB*, 838 F.2d 47 (2d Cir. 1988) 23

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) . . 10

Van Kleek & Co., Inc., 88 NLRB 785 (1950), *enf'd*, 189 F.2d 516 (2d Cir. 1951). 23

PETITION FOR A WRIT OF CERTIORARI

Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit in American Automatic Sprinkler Systems v. NLRB, 4th Circuit Nos. 97-1821 and 97-2014.

OPINIONS BELOW

The decision of the court of appeals is reported at 163 F.3d 209 (4th Cir. 1998) and is reproduced in the separately bound appendix to this certiorari petition ("Pet. App.") at pp. 1a - 29a. The court of appeals order denying rehearing and rehearing en banc is unreported and is reproduced at Pet. App. pp. 182a-183a. The underlying decision and order of the National Labor Relations Board is reported at 323 NLRB 920 (1997) and is reproduced at Pet. App. pp. 30a-181a.

JURISDICTION

The decision of the court of appeals issued on December 17, 1998. That court's order denying timely petitions for rehearing and suggestions for rehearing en banc issued on March 12, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 8(a)(2), 8(a)(5), 8(f), 9(a) and 10(b) of the National Labor Relations Act, as amended, 29 U.S.C.§§ 158(a)(2), (5)and (f), 159(a), and 160(b), insofar as pertinent to this case are set out at Pet. App. pp. 190a-192a.

STATEMENT OF THE CASE

By reason of the Court of Appeals' legal theory here -- and contrary to the time limitations provision of the National Labor Relations Act as well as the general principles designed to assure fair and orderly litigation -- the pertinent events are *not* those that took place in 1994 and that precipitated the timely NLRA §8(a)(5) unfair labor practice charge in this case but rather the events that took place in October *1987*, that *never* precipitated any unfair labor practice charge and that, by reason of the NLRA's six month limitations period, were, as of April, 1988, events that could *never* preoccupied a timely charge or a valid NLRB complaint.[1] Given the resulting posture of the case, we first outline the rulings that brought matters to this pass; we then set out the facts regarding the 1987 events on which, according to the court below, this case pivots; and we conclude by tracing the course of this litigation from the charge to the decision below.

1. In the context of a twenty year history of collective bargaining and during negotiations in 1994 for a new agreement, American Automatic Sprinkler Systems, Inc. ("American Automatic" or "the Employer") -- after only three brief bargaining sessions -- announced that its negotiations with Road Sprinkler Fitters Local 669, U.A., AFL-CIO ("Local 669" or "the Union") were at an end, rejected the Union's requests for further bargaining, and unilaterally instituted substantial changes in terms and conditions of employment. Pet. App. 6A-7A.

---

[1]NLRA § 10(b) provides, in material part, that "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to filing of the charge with the Board..."

Local 669 filed unfair labor practice charges against the Employer with the National Labor Relations Board ("NLRB" or "the Board") and, insofar as relevant here, alleged that American Automatic had implemented unilateral changes in wages and working conditions in violation of NLRA §8(a)(5) without first bargaining in good faith to an impasse.[2] Pet. App. 7a-8a.

After investigation, the NLRB General Counsel issued a §8(a)(5) refusal to bargain in good faith complaint. After a full trial on that complaint, an NLRB Administrative Law Judge found that American Automatic had indeed refused to bargain in good faith in 1994 in violation of NLRA §8(a)(5). And, on exceptions and briefs from that ALJ decision, the NLRB affirmed the ALJ's conclusions. Pet. App. 30a-48a.

American Automatic then petitioned for review in the United States Courts of Appeals for the Fourth Circuit, the NLRB cross petitioned for enforcement and Local 669 intervened. The Court of Appeals denied enforcement to the Board's §8(a)(5) refusal to bargain order. Pet. App. 19a-28a.

In this regard, the Court of Appeals ruled that this refusal to bargain case turns *not* on what American Automatic did in 1994 in the course of its collective bargaining with Local 669, but rather on what had transpired in 1987 (seven years

---

[2]After refusing to bargain, American Automatic also unlawfully constructively discharged Local 669 members and unlawfully refused to employ other Local 669 members, and bypassed the Union to deal directly with unit employees. Local 669 filed NLRA §§ 8(a)(3)and (5) charges regarding these unfair labor practices. Companion unfair labor practice charges were also filed by U.A. Local 536, a sister local union of Local 669, and the two cases were thereafter consolidated and jointly adjudicated before the NLRB and the Court of Appeals.

before the instant NLRB charge was filed) when American Automatic voluntarily signed an agreement -- that had been tendered by Local 669 together with a showing of majority support -- recognizing the Union's status as the NLRA §9(a) majority representative of the Employer's sprinkler fitters employees.[3] Pet. App. 19a-28a.

According to the Court of Appeals, American Automatic's 1987 voluntary §9(a) recognition agreement with the Union was of no effect because the Union had not properly demonstrated its majority status to the Employer at that time; that being so, the Employer had never been subject to an NLRA §8(a)(5) obligation to bargain with the Union; and, that being so, the Employer's refusal to bargain in good faith in the 1994 negotiations was not an unfair labor practice at all but, to the contrary, conduct outside the NLRA's ambit and thus of no concern to the law. Pet. App. 19a-28a.

The Court of Appeals ruled as it did even though the Employer would have committed an NLRA §8(a)(2) unfair labor practice in 1987 by recognizing a nonmajority union as an NLRA §9(a) majority representative of its employees; even though NLRA §10(b) sets a strict six month limitations period for filing unfair labor practice charges, including charges that an employer has recognized a minority union as a §9(a) majority representative; even though no such charge regarding American Automatic's 1987 recognition of Local 669 was ever filed, much less timely filed; and even though the rule, derived

---

[3]NLRA § 9(a) provides, in material part, that "(r)epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining..."

from this Court's decision in Local Lodge 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960), is that § 10(b) prohibits the resurrection of legally defunct unfair labor practices to attack the lawfulness of a union's recognition as a §9(a) majority representative -- whether directly through the filing of an untimely unfair labor practice charge or indirectly through raising an untimely defense.[4]

2. Against this legal background set by the Court of Appeals, we turn next to the sequence of events in 1987.

Early in that year, the NLRB issued its seminal decision restating and revising its rules on construction industry bargaining relationships in John Deklewa & Sons, 282 NLRB 1375 (1987), enf'd sub nom. Iron Workers Local 3 v. NLRB, 843 F.2d 770 (3rd Cir.), cert. denied 488 U.S. 889 (1988). In essence, and insofar as pertinent here, Deklewa holds first that NLRA §8(f) agreements with nonmajority unions in the construction industry are enforceable during their term but do not give rise to a continuing NLRA §8(a)(5) duty to bargain at their expiration; and, second, that, in the construction industry as an all other industries, NLRA §§9(a) and 8(a)(5), which set the legal rules for the voluntary recognition of majority unions, continue to apply so that "the normal presumptions... flow from voluntary recognition accorded to a union by the employer of a stable workforce where that recognition is based on a clear showing a majority support among unit employees..." 282

---

[4]NLRA § 8(a)(2) makes it an unfair labor practice to "dominate or interfere with" the establishment of a union and prohibits granting § 9(a) recognition to a union that does not enjoy majority support among bargaining unit employees. Garment Workers v. NLRB, 366 U.S. 731, 737 (1961).

NLRB at 1387, n.53.[5]

In response to the Deklewa decision, Local 669 requested that American Automatic, along with other employers with whom the Union had collective bargaining relationships, execute a separate written acknowledgment of the Union's status as the §9(a) bargaining representative of its employees in an appropriate bargaining unit. The Union explained that it was seeking to formalize its status as the employees' §9(a) bargaining representative, in the clearest possible terms, in the aftermath of the Deklewa decision and to remove any doubt that the Union was indeed a §9(a) majority representative and not merely a party to a §8(f) agreement in the construction industry. Pet. App. 4a-5a. See also Court of Appeals Joint Appendix at 196 (October 12, 1987 letter from Local 669 to American Automatic in full text).

The §9(a) recognition agreement proposed by Local 669 to American Automatic provided:

> [American Automatic]... has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by ... Local 669 ... for purposes of collective bargaining. [American Automatic] therefore unconditionally acknowledges and confirms that Local 669 is the exclusive

---

[5]Section 8(f) provides, in material part, that it "shall not be an unfair labor practice... for an employer engaged primarily in the building and construction industry to make an agreement... with a labor organization... because (1) the majority status of such labor organization has not been established under the provisions of [Section 9 of the Act]... prior to the making of such agreement..."

> bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act. [Pet. App. 4a].

Local 669 submitted to American Automatic, together with its recognition request, documentation that the Employer's bargaining unit employees were *all* members of the Union. And, Local 669 advised the Employer that, if it was not willing to voluntarily stipulate to the Union's §9(a) majority representative status, the Union would proceed to have its §9(a) majority status determined through an NLRB representational election.

American Automatic signed and returned the Local §9(a) recognition agreement, promptly and without objection or comment. The Employer, moreover, subsequently bargained successor collective bargaining agreements with the Union in 1988 and again in 1991. The 1988 and 1991 agreements each likewise recited Local 669's status as "the exclusive bargaining representative of [American Automatic] sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act." Pet. App. 4a-5a.

3. Nonetheless, in response to Local 669's refusal to bargain in good faith charge in relation to the parties' 1994 negotiations, American Automatic asserted for the first time (i) that the most recent and now expired 1991-94 collective bargaining agreement was merely a §8(f) agreement; and (ii) that -- notwithstanding the parties' twenty year bargaining history and the contrary terms of the Employer's express, written, 1987 §9(a) recognition agreement with the Union -- Local 669 had *never* in fact attained the status of a §9(a) majority bargaining representative of American Automatic's sprinkler fitter employees.

The NLRB summarily rejected American Automatic's attempt to retrospectively nullify its previous recognition of the Union's §9(a) majority representative status as "untimely raised." Pet. App. 33a, 84a-85a.

On review, as we noted at the outset, the Court of Appeals held that American Automatic's 1994 refusal to bargain *could not* have violated NLRA §8(a)(5) because, notwithstanding parties' 1987 §9(a) recognition agreement, at *no time* during the parties' twenty year relationship was the Employer ever "under a [§§9(a) /8(a)(5)] legal obligation to bargain collectively" with the Union. Pet. App. 19a-25a, 28a.

The Court of Appeals rejected the NLRB's ruling that seven years after the fact the Employer was barred from challenging the validity of the 1987 §9(a) recognition agreement and of the Union's status as a majority representative at that time:

> Recent decisions of the Board and of the Tenth and Eleventh Circuits to the contrary notwithstanding, we do not believe that Section 10(b) can reasonably be interpreted to prohibit [the Employer], the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective recognition that is the basis of the *Board's* Complaint. [Pet App. 21a., emphasis in original]

The court below noted that NLRA §10(b), by its terms, governs *"complaints* filed by the Board" and that even if "*arguendo*" it could be said that §10(b) imposes time limitations upon an untimely challenge the validity of a

recognition of a union as a §9(a) majority bargaining representative as a *defense* to an NLRB complaint in non-construction industry cases, §10(b) can not have such an application in the construction industry because NLRA §8(f) "establishes the legality of such [nonmajority §9(a)] relationships" in the construction industry. Pet. App. 19a-21a.

The Court of Appeals then proceeded to investigate the record evidence and decide for itself the validity of the Employer's 1987 §9(a) recognition agreement, and found the agreement retroactively null and void. According to that court, the asserted existence of a union security clause in the collective bargaining agreement in effect in 1987 in and of itself rendered the undisputed fact of union *membership* of the unit employees at the time of union recognition an insufficient indicator of their desire for union *representation* to support recognition of the Union as a §9(a) majority representative. Pet. App. 22a-24a.

REASONS FOR GRANTING THE WRIT

I. The Scope of the Bryan Manufacturing Preclusion Rule

The Fourth Circuit's decision here is in the teeth of all of the following:

- Congress' policy, embodied in NLRA §10(b), of "protect[ing] continuing collective bargaining systems from delayed attack," United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 68 (1981) (Stewart J. concurring);

- This Court's teachings on §10(b) in Local Lodge No. 1424 v. NLRB, (Bryan Manufacturing), 362 U.S. 411 (1960);

- The NLRB's uniform post-Bryan Manufacturing line of decisions holding that §10(b) principles bar "delayed [counter] attacks" on continuing collective bargaining systems through the untimely interposition of the defense that the bargaining relationship was invalid at its inception, as well as "delayed attacks" on such systems through the filing of untimely charges alleging such an initial invalidity;[6]

- The decisions of the Third, Fifth, Sixth, and Ninth Circuits endorsing the Board's application of §10(b) principles to bar delayed attacks on continuing non-construction industry collective bargaining systems through the interposition of an

---

[6]E.g. Brower's Moving & Storage, 297 NLRB 207, 209 n.11 (1989), enf'd 914 F.2d 239 (2d Cir. 1990), cert. denied 499 U.S. 905 (1991); Mr. Clean of Nevada, 288 NLRB 895, 907 (1988); Morse Shoe, 227 NLRB 391, 394 (1976); North Bros. Ford, Inc., 220 NLRB 1021 (1975)(citing cases.)

untimely defense;[7] and

• The decisions of the Tenth Circuit in MFP Fire Protection v. NLRB, 101 F.3d 1341 (10th Cir. 1996), and the Eleventh Circuit in NLRB v. Triple A Fire Protection, 136 F.3d 727 (11th Cir. 1998), cert. denied 119 S.Ct. 795 (1999) -- cases that are all but legally and factually *identical* to the instant case -- ratifying the application of the same § 10(b) principles by the Board to bar such attacks in the *construction industry*.[8] The decision below is, indeed, in *direct and irreconcilable* conflict with the Tench Circuit's MFP Fire Protection decision and the Eleventh Circuit's Triple A Fire Protection decision.[9]

"The 6 month bar of §10(b) was enacted to strengthen and defend the 'stability of bargaining relationships.'" United Parcel Service, Inc., 451 U.S. at 68 (Stewart, J. concurring) (citing Bryan Manufacturing, supra)(footnote omitted). Section 10(b) does so by precluding delayed challenges to the validity

---

[7]Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476, 483 (3d Cir. 1980); Daisy's Originals of Miami, Inc. v. NLRB, 468 F.2d 493, 501 (5th Cir. 1972); NLRB v. Dist. 30, UMW, 422 F.2d 115, 120 (6th Cir. 1969), cert. denied 393 U.S. 959 (1970); NLRB v. Traignew, Inc., 470 F.2d 669, 673 (9th Cir. 1972). See also NLRB v. Brower's Moving & Storage, 914 F.2d 239 (2d Cir. 1990), affirming without opinion 297 NLRB 207, 209 n.11 (1989).

[8]See also NLRB v. Goodless Elec. Co., Inc., 124 F.3d 322, 329-31 (1st Cir. 1997)(dicta).

[9]The Tenth Circuit's decision in MFP Fire Protection followed its earlier decision in NLRB v. Viola Industries-Elevator Div., Inc., 979 F.2d 1384 (1992), holding that a construction industry employer's eleven month after the fact claim that the employer had been "coerced" into signing a §8(f) prehire agreement was precluded by the §10(b) time limitation which "has been interpreted to apply to affirmative defenses such as coercion." Id. at 1387 (citations omitted).

of an employer's recognition of a union as a §9(a) majority bargaining representative that would require "litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the event in question have become dim and confused'," Bryan Manufacturing, 362 U.S. at 419 (quoting H.R. Rep. No. 248 80th Cong. 1st Sess., p.40). And, with full recognition of the competing interests that would justify permitting delayed challenges to an employer's recognition of a union as a §9(a) majority bargaining representative and the concomitant of a legally protected bargaining relationship, Congress chose to preclude such challenges on the judgement that the paramount interest in this instance is "'industrial peace which it is the over-all purpose of the Act to secure'." Bryan Manufacturing, 362 U.S. at 428.

The conflict in the circuits generated by the decision below on whether §10(b) precludes delayed *counter* attacks on the validity of the construction industry collective bargaining systems -- and the disuniformity in the law it entails -- in itself undermines Congress' regime for achieving industrial peace.

It is plainer yet that the Fourth Circuit's ruling is antithetical to the system Congress provided for administering the national labor policy in a manner that furthers industrial peace and stability:

- Whereas Congress took extraordinary precaution against "litigation over past events," the Fourth Circuit's decision here encourages such litigation and the labor management instability -- and unfair and unjust results -- that such litigation generates.

- And, whereas Congress took those precautions to preclude delayed assaults on ongoing collective bargaining

systems, the Fourth Circuit decision provides construction employers -- such as the Employer here whom the court below recognized as "anti-union" and bent on "rid[ding] its workforce of active union members" -- with an incentive to bargain in bad faith with a union that the employer knows is a current majority representative and to play the odds that the union can not, as a condition of securing NLRB relief against that plain current wrong, prove the validity of its original recognition many years or even decades before and "after records have been destroyed, witnesses have gone elsewhere and recollection of the event in question have become dim and confused."

In sum, the decision below generates a conflict in the circuits on a recurring questions of great moment to the proper administration of the National Labor Relations Act and does so through a ruling that defies Congress' judgement that delayed attacks on continuing collective bargaining systems are inimicable to the proper effectuation of the national labor policy and should, on that ground, be barred. That being so, this is a case that calls for this Court's review.

1. Bryan Manufacturing held that an NLRA §8(a)(2) charge challenging the recognition of a minority union as a §9(a) majority representative and the signing of a collective bargaining agreement containing a union security clause, filed fifteen months after that recognition and the consummation of that agreement, is barred by The NLRA §10(b) six month limitations period. The Court emphasized that to further "the interest in industrial peace," Congress "barred the Board from dealing with past conduct after the [§10(b) six month] period had run even at the expense of the vindication of statutory rights." 362 U.S. at 428-29.

The NLRB was thereafter called on to apply the Court's

Bryan Manufacturing teaching where the belated challenge to the validity of an NLRA §9(a) recognition and the initiation of a collective bargaining relationship governed by §8(a)(5) took the form of an untimely *defense* rather than the form of an untimely charge. In Hod Carriers Local 1298 (Roman Stone Construction Co.), 153 NLRB 659, n.3 (1965), the Board ruled that the Bryan Manufacturing preclusion rule applies to both situations. Thus, a construction industry union could not raise a belated challenge to a rival union's voluntary recognition and majority status *as a defense* to an allegation of unlawful recognitional picketing in violation of §8(b)(7)(A).

By the same token, the Bryan Manufacturing rule bars untimely counter attacks on continuing collective bargaining systems made as a defense by employers charged with an NLRA §8(a)(5) refusal to bargain in good faith:

> ...(T)he Board has refused to allow unions charged with unlawful picketing to invoke as a defense the invalidity of the incumbent union's initial recognition, in circumstances where Section 10(b) would have precluded a direct challenge to the legality of such recognition in unfair labor practice proceeding ... We perceive no valid reason in principle why a greater privilege should be given an employer... [Barrington Plaza and Traigniew, Inc., 185 NLRB 962, 964 (1970), enf'ment denied on other grounds sub. nom NLRB v. Traigniew, 470 F.2d 669 (9th Cir. 1972).]

The NLRB's reading of Bryan Manufacturing as the predicate for a bar to raising delayed challenges to the validity of an initial §9(a) recognition as a defense has been endorsed

by the Third, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits, in essence for the reasons stated by the Sixth Circuit:

> [The Respondent Unions] attempt to avoid the holding in [*Bryan Manufacturing*] by pointing out that it was not [the Unions] who filed the complaint [and] that [the Unions] merely sought to shed light on the true character of matters occurring within the [Section 10(b)] limitations period...
>
> Both of these contentions are without merit. The Supreme Court announced a rule in [*Bryan Manufacturing*] which prevents the resurrection of legally defunct unfair labor practices in the guise of evidence and the resultant subversion of the policies promoted by the limitations period of Section 10(b). To permit [the Unions] to invoke the company's putative unfair labor practices as a defense to the unlawful picketing charge would be directly contrary to this rule. [NLRB v. Dist. 30, UMW, 422 F.2d 115, 121-22 (6th Cir. 1969).][10]

2. Building on these precedents, the Board has ruled that the Bryan Manufacturing preclusive rule against delayed attacks on continuing collective bargaining systems applies in the construction industry as well as in nonconstruction industries covered by the NLRA:

> In non-construction industries, if an employer grants Section 9 recognition to a union and

---

[10]See cases cited at fn.7, supra.

more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.

These same principles would be applicable in the construction industry. In *Deklewa*, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in nonconstruction industries, who have established and maintained a stable Section 9 relationship, are entitled to protection against a tardy attempt to disrupt their relationship. Parties in the construction industry are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. [Casale Industries, 311 NLRB 951, 953 (1993)(citing Bryan Manufacturing, supra).][11]

In two recent decisions, the Tenth Circuit and the Eleventh Circuit have endorsed the Board's recognition that the

---

[11]See also Decorative Floors, Inc., 315 NLRB 188, 188-89 (1994); Hayman Electric, 314 NLRB 879, n.2 (1994); Excel Fire Protection, 308 NLRB 241, 243 (1992). See Deklewa, 282 NLRB at 1387, n.53; McLean County Roofing, 290 NLRB 685, 686 n.4 (1988).

Bryan Manufacturing preclusion rule applies to construction industry employer counterattacks on continuing collective bargaining systems through an untimely defense to a timely refusal to bargain in good faith charge. As the Eleventh Circuit put its conclusion,

> In this case, the Board held that its decision in Deklewa has established that unions in the construction industry which had achieved full Section 9(a) recognition should not have less favored status then unions outside the construction industry... [and] that the six-month limitations period of Section 10(b) was applicable and that a challenge to a union's majority status could not be entertained after a lapse of more than six months. We hold that the Board's interpretations is reasonable ... [and that] Local 669 thus enjoyed Section 9(a) status, just as any other union outside the construction industry. [Triple A Fire Protection, supra, 136 f.3d at 737.]

It is very much to the point that MFP Fire Protection and Triple A Fire Protection arose on *precisely* the same facts as the instant case. All three decisions involve employers in the fire protection sector of the construction industry that (i) voluntarily executed the *identical* October 1987 §9(a) recognition agreements with Local 669; and (ii) then sought to retrospectively repudiate that same recognition agreement some years later as a defense to an NLRA §8(a)(5) refusal to bargain in good faith complaint. Indeed, the three cases are, as the Board recognized, "materially identical... and controlled by" the same legal principles. MFP Fire Protection, 318 NLRB at 842.

3. All this notwithstanding -- and, in the Fourth Circuit's words, "recent decisions of the Board and of the Tenth and Eleventh Circuit to the contrary notwithstanding," -- the court below held that the Board's Bryan Manufacturing rule precluding untimely "employer defenses of invalid voluntary recognition" to timely refusal to bargain in good faith charges is an invalid rule "in the construction industry context." Pet. App. 19a-21a.

In creating this conflict in the circuits, the Fourth Circuit did not deny that its ruling sanctions exactly what the Bryan Manufacturing rule is intended to preclude: "delayed attack[s]" on "continuing collective bargaining systems" that undermine both the "stability of bargaining relationships," United Parcel Service, Inc., 451 U.S. at 68 (Stewart, J. concurring), and the "industrial peace which it is the over-all purpose of the Act to secure," Bryan Manufacturing, 362 U.S. at 428; or that its ruling does so by precipitating "litigation over past events after records have been destroyed, witnesses have gone elsewhere and recollections of the events in question have become dim and confused," id. at 419 (internal quotation marks omitted). Nor did the Fourth Circuit point to anything so much as suggesting that the interests furthered by the Bryan Manufacturing rule are interests that do not apply in the "construction industry context" in the same way and with the same force as in all other NLRA contexts.

To be sure, the court below did advert to the interest in "employee free choice" as the interest furthered by, and justifying, its ruling. Pet. App. 24a. But that was the interest invoked by the respondents in Bryan Manufacturing in arguing for a "continuing violation" theory that would permit delayed attacks on the validity of §9(a) majority bargaining

representative recognitions. And, it is the interest this Court concluded is outweighed by the interests in industrial stability and industrial peace furthered by the §10(b) preclusion rule the Court adopted there -- and the Fourth Circuit here rejected in the construction industry.

It is also to the point that in cases like this one -- in which no employee has ever raised any objection to union representation and in which an employer, who has refused to bargain in good faith and who has done so as part of an overall anti-union campaign of discriminatory discharges of union members and of discriminatory refusals to hire, raises the defense that, deep in the past, the employer improperly recognized a minority union as a §9(a) majority bargaining representative "to allow [the] employer[ ] to rely on employees' rights in refusing to bargain with the... designated union is not conducive to [industrial peace], it is inimical to it," Auciello Iron Works, Inc. v. NLRB, 517 U.S. 781, 790 (1996)(citing Brooks v. NLRB, 348 U.S. 96, 103 (1954)(Bracketed material in original).

On analysis, then, the entire base for Fourth Circuit's decision here is this:

> As one Board member recognized in Triple A Fire Protection, Inc., 312 NLRB 1088, 1089 n.3 (1993), "the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition." Id, at 1089 n.3. Thus, in the construction industries, a *defense* of valid voluntary recognition is tantamount to

> a *charge* of unlawful conduct under the NLRA provisions prohibiting employers and nonmajority unions from entering into collective-bargaining agreements. This is not the case in the construction industry, where 8(f) itself establishes the legality of such relationships. [Pet.App. 20a-21a (emphasis in original)].

That base is too insubstantial to support a feather. Very simply stated it is made up of a plain and complete misunderstanding of the substantive NLRA law governing §8(f) agreements in the construction industry, §9(a) bargaining relationship in that industry, and the interrelation between the two.

As this Court has observed, NLRA §8(f) "allows construction industry employers and unions *to enter into agreements* setting the terms and conditions of employment for the workers hired by the signatory employers without the union's majority status first having been established in the manner provided for in §9 of the Act." McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1983) (emphasis supplied). Thus, §8(f) does *not* license minority §9(a) *recognition* in the construction industry. To the contrary, §8(f) has a far more modest office -- it is "[t]he *execution of an agreement* with a minority union, an act normally an unfair practice by both employer and union, [that] is legitimated by §8(f) when the employer is in the construction industry." NLRB v. Local 103 Iron Workers (Higdon Const. Co.), 434 U.S. 335, 345 (1978) (emphasis supplied).

None of this has anything to do with the requisites for a valid construction industry employer recognition of a

construction industry union as the §9(a) majority bargaining representative of a group of employees in an approperate bargaining unit or of the law governing the recognition of a minority construction industry union as a §9(a) representative.

Since long before the Board's 1987 Deklewa decision it has been settled law that employer recognition of a union as an NLRA §9(a) exclusive bargaining representative in the construction industry is governed by the same principles that govern in all other NLRA industries, and that a valid construction industry recognition agreement has the same force and effect and establishes the same continuing rights and obligations as such an agreement in any other industry. Deklewa, 282 NLRB at 1387, n.53; Decorative Floors, Inc., 315 NLRB 188, 189 (1994); Hayman Electric System, 314 NLRB 879, 887 n.8 (1994); Golden West Electric, 307 NLRB 1494, 1495 (1992); Great Southern Construction, Inc., 266 NLRB 364, 365 (1983). See generally, e.g., NLRB v. Gissell Packing Co. Inc., 395 U.S. 575, 596-99 (1996).[12]

Equally to the point, the NLRA §8(a)(2) prohibition against extending voluntary §9(a) recognition in the construction industry where the requirements of §9(a) are not satisfied is likewise well established by longstanding NLRB caselaw. [13]

---

[12]Voluntary §9(a) majority recognition in the construction industry dates back to at least the early 1960's. E.g., Island Construction Co., Inc., 135 NLRB 13, 15-16 (1962).

[13]The application of NLRA §8(a)(2) to prohibit invalid §9(a) *recognitions* in the construction industry is commonplace in NLRB decisions such as where an employer has been found to have improperly assisted the union in obtaining majority support among unit employees or coerced employees into joining the union, or where a previous union

Nothing in §8(f) effects either of these settled rules of long standing. Section 8(b) agreements and §9(a) recognition agreements are entirely separate distinct and the law governing each class of agreements is entirely separate and distinct.

The sum of the matter is this: on every count the Tenth Circuit's MFP Fire Protection decision and the Eleventh Circuit's Triple A Fire Protection decision applying the Bryan Manufacturing rule to the construction industry are correct, and the Fourth Circuit's contrary decision here is wrong.

II. The Validity of the §9(a) Recognition Agreement

The Fourth Circuit's substantive ruling that the 1987 American Automatic/Local 669 §9(a) recognition agreement was null and void at its inception and that the parties here had no collective bargaining relationship governed by §§9(a) and 8(a)(5) is as wrong as its Bryan Manufacturing ruling and as harmful to industrial peace and stability.

---

was awfully recognized or where a rival union his claimed recognition. E.g., Freeman G. Gaffney, 205 NLRB 1012, (1973), enf'd 506 F.2d 1052 (3d Cir. 1974) (employer assistance and coercion invalidated voluntary recognition); Florida Automatic Sprinkler Contractors, Inc., 199 NLRB 1151, 1158 (1972) (supervisory participation in obtaining authorization cards); Clement Bros., 165 NLRB 698, 699 (1967), enf'd 407 F.2d 1027 (5th Cir. 1969)(employer and union coercion); Bear Creek Construction Co., 135 NLRB 1285, 1286 n.4 (1962)(same). Pacific Erectors, Inc., 256 NLRB 421, 424-25 (1981), enf'd 718 F.2d 1459 (9th Cir. 1983) (prior valid recognition of other union); Edwards & Webb Construction Co., 207 NLRB 614, 619 n.22 (1973)(same). Komatz Construction Inc., 191 NLRB 846, 850-51 (1971), enf'd in part 458 F.2d 317 (8th Cir. 1972)(recognition in the face of rival union's claim of recognition); Couch Electric Co., 143 NLRB 662, 669 (1963)(same).

The Fourth Circuit's decision here notwithstanding, the law in this regard is straight forward and, deeply rooted in the Act. First, as we have noted, voluntary employer recognition of a union as an NLRA §9(a) majority bargaining representative is as valid in the construction industry as in any other industry and such a valid construction industry recognition agreement has the same force and effect and establishes the same continuing rights and obligations as such an agreement in any other industry. See pp. 20-21, supra.

Second, the test of the validity of such an employer recognition agreement is *not* whether the union's proffered evidence of majority employee support is adequate on its face but rather whether the union -- as it claimed and as the employer concluded -- was, *in fact,* the chosen representative of a majority of the employees in an appropriate bargaining unit. Garment Workers, supra, 366 U.S. 737-39. Indeed, no contemporaneous evidentiary proffer of majority union support among unit employees is required. As the First Circuit recently observed, in a construction industry voluntary recognition case cited by the Fourth Circuit here, the union's demand for and "the employer's grant of recognition must be predicated on at least an unchallenged claim, if not actual showing, of *contemporaneous* majority support." NLRB v. Goodless Elec. Co., Inc., supra, 124 F. 3d at 329 (emphasis in original, footnote omitted.)[14]

---

[14]It is axiomatic that the union is *not* required to have affirmatively *demonstrated* its majority to the employer at the time of recognition provided, of course, that the union *in fact* represented a majority of unit employees at the time,. E.g., Royal Coach Lines v. NLRB, 838 F.2d 47, 50-51 (2d Cir. 1988); Carmichael Construction Co., 258 NLRB 226, n.1 (1981) enf'd 728 F.2d 1137 (8th Cir. 1984); NLRB v.

Both of these well-settled legal rules rest on the firmest statutory base and nothing in the Fourth Circuit decision provides even a suggestion of any reason for departing from either one. Rather, what the decision below does, we submit, is to adopt a codicil to these rules to the effect that in a construction industry case a voluntary recognition agreement is invalid *per se* if the union's proffer of majority support is that the unit employees are union members and that proffer is made against the background of an extant union security agreement. That codicil to the voluntary recognition agreement law is wrong in two basic regards.

As general matter, a showing that a majority of unit employees are union members is a sufficient showing to support a voluntary employee recognition agreement. E.g., Florsheim Shoe Store Co. v. NLRB, 565 F.2d 1240, 1245 (2d Cir. 1977) ("Joining a union normally implies an authorization to the union to act as bargaining agent..."); Lowery Trucking Co., 177 NLRB 13, 20-21 (1969), enf'd sub nom. Ace-Alkire Freight Lines v. NLRB, 431 F.2d 280 (8th Cir. 1970); Raley's, Inc. 227 NLRB 670 n.1 (1976), enf'd sub nom. NLRB v. Retail Clerks Local 588, 587 F.2d 984 (9th Cir. 1978).

And, contrary to the Fourth Circuit decision, the existence of a background union security clause is *not* a basis for invalidating a union showing of interest based on the bargaining unit employee union membership. In the real world of affairs, voluntary majority union membership among bargaining unit employees comes first and a union security agreement comes second, not the other way around. Strong

---

E.L. Rice & Co., 524 F.2d 1148, 1149 (6th Cir. 1975); Van Kleek & Co., Inc., 88 NLRB 785 n.6 (1950), enf'd 189 F.2d 516 (2d Cir 1951).

unions with strong employee support -- and only such unions -- are able to secure union security agreements. Employers -- particularly employers with strong anti-union proclivities like American Automatic -- do not give such agreements away for free as a sign of their benevolence.

Thus the Fourth Circuit's airy assumption -- without any basis in any record fact -- that the extant union security agreement, standing alone, demonstrates that the covered employees are "involuntary" union members could not be more wrong. As this Court said in invalidating an NLRB rule that a union hiring hall provision coerces all the employees who use the hiring hall into involuntary union membership:

> [T]here is no evidence that any of [the Unions] coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know, they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him. [Local 60 Carpenters v. Labor Board, 365 U.S. 651, 655 (1961).]

What we have said is more than sufficient to demonstrate the Fourth Circuit's error. But there is more. The Fourth Circuit proceeded as if the question of whether the voluntary recognition agreement here rested on a proper

showing of majority employee support was litigated before the Board; that the entire record consisted of a contemporaneous membership list and an extant union security agreement; and that, on this record, the panel concluded that the evidence of the Union's majority status was legally inadequate.

But, of course, none of this is true. Before the Board, American Automatic did *not* challenge in any way Local 669's claim of majority support insofar as that claim rested on the bargaining unit employees' union membership. Accordingly, the Union did not put in any evidence as to the voluntary nature of that membership. Indeed, except for the formal papers -- the Union demand for recognition and the employer voluntary recognition agreement -- the record in this case is bare in this regard precisely because the issue was never litigated. The Fourth Circuit's ruling in this regard is not based on record evidence but on non-record evidence and surmise.

How this case was litigated at the Board, moreover, goes to its essence. If put to the test, Local 669 with the greatest assurance could have made its proof that the union memberships here were purely voluntary and strongly held, and that those memberships accurately reflected the members' designation of the Union as their chosen exclusive collective bargaining representative.

Given all this it was the plainest error for the Fourth Circuit to have addressed, much less to have accepted, the Employer's belated, nonrecord based, challenge to the Union's showing of majority support as providing an inadequate evidentiary basis for the 1987 recognition agreement. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142

(1973). Thus "[i]f the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court can not evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." Florida Power & Light Co., v. Lorion, 470 U.S. 729, 744 (1985).

It is most assuredly *not* the proper course in a case like this for a Court of Appeals to decide an issue not raised or litigated before the NLRB and to do so in a few snippets of non-record "fact" tendered by a party who failed to raise the issue before the administrative agency.

Both as a matter of commission and of omission, then, the Fourth Circuit's invalidation of the 1987 recognition agreement here -- and that court's grant to American Automatic's of a right to bargain in bad faith in 1994 with a union that most assuredly had the strongest majority support -- could not have been more wrong or more contrary to the Act's collective bargain purposes.

CONCLUSION

This petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted

WILLIAM W. OSBORNE, JR.
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Suite 1150
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

(2)

Supreme Court, U.S.
FILED

JUN 10 1999

No. 98 1986

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

AMERICAN AUTOMATIC SPRINKER SYSTEMS, INC.

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

---

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

1931

INDEX OF APPENDICES

Page

APPENDIX A 1a

APPENDIX B 30a

APPENDIX C 182a

APPENDIX D 184a

APPENDIX E 190a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 97-1821; 97-2014

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

On Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Argued September 23, 1998 Decided December 17, 1998

JUDGES: Before WIDENER and LUTTIG, Circuit Judges, and MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation. Judge Luttig wrote the opinion, in which Judge Widener and Senior Judge Magill joined.

COUNSEL: ARGUED: Lawrence Edward Dube, Jr., DUBE & GOODGAL, P.C., Baltimore, Maryland, for American Automatic.

Steven B. Goldstein, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board. William W. Osborne, Jr., OSBORNE LAW OFFICES, P.C., Washington, D.C., for Intervenor.

ON BRIEF: Frederick L. Feinstein, General Counsel, Linda Sher, Associate General Counsel, Aileen A. Armstrong, Deputy Associate General Counsel, Margaret Ann Gaines, Supervisory Attorney, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Board. Marc D. Keffer, OSBORNE LAW OFFICES, P.C., Washington, D.C., for Intervenor.

LUTTIG, Circuit Judge:

Petitioner American Automatic Sprinkler Systems, Inc., petitions for review of a decision and order of the National Labor Relations Board concluding that American violated section 8(a)(1), (a)(3), and (a)(5) of the National Labor Relations Act, 29 U.S.C. section 158(a)(1), (a)(3), and (a)(5), by, inter alia, failing to bargain in good faith with the union locals upon the expiration of collective-bargaining agreements, unilaterally changing working conditions, and discriminating against certain individuals on the basis of union membership. The NLRB cross-petitions for enforcement of its decision and order. For the reasons that follow, we conclude that American did not have a legal obligation to negotiate with or recognize its collective-bargaining partners upon the expiration of their respective agreements, and thus did not violate section 8(a)(5) or (a)(1) by unilaterally changing the conditions of employment. However, because we conclude that the Board's findings of unlawful discrimination against union members in violation of section 8(a)(3) and (a)(1) are supported by substantial evidence in the record as a whole, we enforce the Board's order as to these findings. Accordingly, we grant in part and deny in part American's petition for review, grant in part and deny in part the Board's cross-petition for enforcement of its order, and remand the case to the NLRB for entry of an appropriate remedial order.

I.

American is an Owing Mills, Maryland, firm engaged in the fabrication, installation, and servicing of fire sprinkler systems. Road Sprinkler Fitters Local Union No. 669, U.A., A.F.L.-C.I.O. is a sprinkler fitters' union with near nationwide geographic jurisdiction. Road Sprinkler Fitters Local Union No. 536 has jurisdiction over Baltimore, Maryland, and surrounding areas.

Since it began operations in 1974, American has been a party to successive collective-bargaining agreements with Local 669 and Local 536 by virtue of its membership in a multiemployer bargaining association, the National Fire Sprinkler Association ("NFSA" or "the Association"). These negotiated collective-bargaining agreements established the terms and conditions of employment for American's journeymen and apprentice sprinkler fitter employees employed in the respective territorial jurisdictions of Locals 669 and 536.

In 1987, American signed a form recognition agreement acknowledging Local 669 as the exclusive bargaining representative of its sprinkler fitter employees working in Local 669's jurisdiction. The agreement, which was accompanied by fringe benefit forms demonstrating majority union membership, stated:

> [American] . . . has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by . . . Local 669 . . . for purposes of collective bargaining. [American] therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

American signed another such recognition agreement with Local 669 in 1988 that stated as follows:

> [American] hereby freely and unequivocally acknowledges that it has verified the Union's status as the exclusive bar gaining representative of its employees pursuant to Section 9(a) of the National Labor Relations Act.

And, in 1991, NFSA, which was then American's bargaining representative, negotiated a collective-bargaining agreement with Local 669 that included a similar recognition clause. That agreement took effect April 1, 1991, and expired on March 31, 1994. NFSA also negotiated a collective-bargaining agreement on behalf of its members, including American, with Local 536. This agreement, which was effective from June 1, 1991, to May 31, 1994, included an identical recognition clause to that in the Local 669 agreement:

> The National Fire Sprinkler Association for and on behalf of its contractor members . . . recognizes [Local 536] as the sole and exclusive bargaining representative for all journey men sprinkler fitters and apprentices in the employ of said employers [working in the City of Baltimore and its 10 sur rounding miles], . . . pursuant to section 9(a) of the National Labor Relations Act.

In late January, 1994, American notified both Local 669 and 536 that it was withdrawing bargaining authority from the NFSA and intended thereafter to bargain independently with the unions. Within days, Local 536 requested that the Company identify dates and times to bargain. The Company never responded to this initial communication or to three telephone messages to the same effect.

The Company eventually met with the Local on May 31, 1994, the day the NFSA agreement expired. At that time, however, the Company offered no proposal and filed the Local's proposal without reviewing it. The Company's Vice-President Mike McCusker submitted its first proposal to the Local on July 25, 1994. The proposal was less than a page long in its entirety, and, in addition to drastically cutting wages and benefits, it would have effectively eliminated union representation. The proposal included no recognition clause, no description of the bargaining unit, no contract term, and no provisions addressing dues check-off, union security, grievances and arbitration, overtime, or lunch time, holiday or vacation pay. The proposal required employees to furnish all of their own tools, irrespective of cost, created a new non-unit position of "helper," and eliminated the union apprenticeship program and territorial jurisdiction.

After three brief "bargaining sessions" in which the Company expressed no willingness to deviate in any way from its initial proposal, McCusker informed the union negotiating representative on August 9, 1994, that the parties were at an "impasse" because the union had rejected its "final offer." Further, McCusker indicated that the Company would begin implementing the terms of its proposal on August 11. When the union stated its wish to continue negotiations, the Company did not respond, and instead began implementing the terms of its proposal through negotiations with individual employees.

McCusker's negotiations with Local 669 proceeded in similar fashion. There were three negotiating sessions in which the Company expressed no willingness to compromise on its substantially identical proposal or even consider the Local's proposal. As occurred with Local 536, the sessions ended with

the Company's abrupt declaration of impasse and its rejection of further entreaties by the union.

In the weeks following American's declarations of impasse, the Company required all employees to submit individual applications for work and entered into individualized negotiations. Executives of the Company told employees and union members that the Company was going "nonunion," and suggested that it would be able to give better offers to individuals who resigned their union cards. During this time period, one of the general contractors for whom the Company was working as a subcontractor complained repeatedly that the Company was behind schedule due to labor shortages.

As a consequence of the Company's actions, Locals 669 and 536 and their individual members filed charges with the Regional Director of the NLRB, who in turn issued a series of complaints against the Company. The Administrative Law Judge to whom the complaints were referred found that the Company had violated section 8(a)(5) and (a)(1) of the NLRA by bargaining in bad faith with the Locals and prematurely declaring an impasse, bypassing both Locals and dealing directly with individual employees, and unilaterally making changes in mandatory subjects of bargaining and the scope of the bargaining units.[1] The ALJ further found that the Company

---

[1] Section 8(a), 29 U.S.C. section 158(a), provides, in relevant part, as follows:

It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any

had violated section 8(a)(1) of the NLRA by telling employees it was going "nonunion," telling an employee that he could not work as a foreman because of his father's union affiliation, and impliedly promising an employee a wage increase if he resigned his union membership card. Finally, the ALJ found that the Company had violated section 8(a)(3) and (a)(1) of the Act by refusing to hire or reinstate, discharging and constructively discharging, and imposing onerous working conditions on, members of both Locals.

On appeal, the Board affirmed the conclusions of the ALJ, finding additional violations with respect to the treatment of certain individual employees. The Board ordered the Company to bargain with both Locals, rescind the unilateral changes, make employees and Locals' funds whole for any losses directly attributable to the Company's unilateral changes, offer certain individuals immediate employment in their former jobs, or to the jobs to which they would have been assigned, and make these individuals whole for any losses suffered as a result of the discrimination against them.

American petitions for review of the Board's findings and order, and the Board cross-petitions for enforcement of its order.

II.

A.

---

term or condition of employment to encourage or discourage membership in any labor organization. . ..

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

We consider first American's contention that it was not under a legal obligation to bargain collectively with Locals 669 and 536 and thus could not have violated section 8(a)(5) and (a)(1) of the Act by bargaining in bad faith and making unilateral changes in the conditions of employment.

An employer is obligated under section 8(a)(5) to bargain collectively with a union that has been "designated and selected for the purposes of collective bargaining by the majority of employees," pursuant to section 9(a) of the Act, 29 U.S.C. § 159(a). An employer who is party to an agreement with a union "designated and selected" in accordance with section 9(a) may not repudiate the contract during its term and may not refuse to bargain with the union following expiration of the contract, unless the employer proves either that a majority of its employees did not in fact support the union or that it doubted in good faith the union's majority status. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 108 L. Ed. 2d 801, 110 S. Ct. 1542 (1990); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 597 n.11, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969). Conversely, in the usual case it is an unfair labor practice under section 8(a)(1) and (2) for an employer, and section 8(b)(1)(A) for a union, to enter into a collective-bargaining agreement when only a minority of employees has "designated and selected" the union as its bargaining representative. See *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon)*, 434 U.S. 335, 344, 54 L. Ed. 2d 586, 98 S. Ct. 651 (1978) ("There could be no clearer abridgment of section 7 of the Act, assuring employees the right 'to bargain collectively through representatives of their own choosing' or 'to refrain from' such activity than to grant exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting

majority." (internal quotations and citation omitted)); *Garment Workers' v. NLRB*, 366 U.S. 731, 737, 6 L. Ed. 2d 762, 81 S. Ct. 1603 (1961) (same).

Section 8(f) of the NLRA, 29 U.S.C. section 158(f), created an exception to this general prohibition. Enacted by Congress in 1959 to address problems unique to the building and construction trades, section 8(f) allows construction industry employers and unions to enter into "prehire" agreements before a majority of employees has approved the union as its bargaining representative.[2]

In *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enforced sub nom. *International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local v. NLRB*, 843 F.2d 770 (3rd Cir. 1988), the Board substantially modified its then-existing interpretation of section 8(f) and introduced new rules

---

[2] Section 8(f) provides in relevant part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, member ship in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, . . .: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

governing the relationship between parties to an 8(f) collective-bargaining agreement. Prior to *Deklewa*, the rights of employers and unions in 8(f) relationships were governed by the Board's decision in *R.J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), enforcement denied sub nom. *Local No. 150, Int'l Union of Operating Eng'rs v. NLRB*, 156 U.S. App. D.C. 294, 480 F.2d 1186 (D.C. Cir. 1973), and the associated "conversion doctrine."

Pursuant to *R.J. Smith*, an 8(f) agreement "conferred no presumption of majority status" on the signatory union and could be repudiated at any time and for any reason by either party. *Deklewa*, 282 N.L.R.B. at 1378. Subsequent cases established, in reliance upon a suggestion by the Board in R.J. Smith that such might occur, that a conversion of an 8(f) relationship into a standard 9(a) relationship could be accomplished by a showing that the union had at some point during the term of the contract enjoyed majority support among an appropriate unit of the employer's employees. *Id.* This majority support, the reasoning went, could be established by proof of any of a number of objective evidentiary factors, the existence of which was typically quite burdensome to litigate. *Id.* Once the Board determined that conversion had occurred, the union was accorded "immediate and complete 9(a) status, and any collective-bargaining agreement in effect acquired the status of a collective-bargaining agreement enforceable before the Board." 282 N.L.R.B. at 1379. As with any other 9(a) relationship under the Act, the union would also enjoy a rebuttable presumption of majority status at the expiration of the contract, and the employer would be legally obligated under the NLRA to engage in good faith collective bargaining. *Id.*

In *Deklewa*, the Board abandoned R.J. Smith and the conversion doctrine, concluding that this analytical framework

did "not fully square with either 8(f)'s legislative history" or text, "inadequately served the fundamental statutory objectives of employee free choice and labor relations stability,"] *id.* at 1380, and "entailed evidentiary determinations that are inexact, impractical, and generally insufficient to support the conclusions they purport to demonstrate." *Id.* at 1384. In its place, the Board established a new framework for 8(f) relationships. The Board declared that an 8(f) agreement is binding and enforceable during the duration of the contract, and cannot be unilaterally repudiated by either party to the agreement, *id.* at 1385, but that, upon the contract's expiration, the signatory union will not enjoy a presumption of majority and either party may repudiate the 8(f) relationship, *id.* at 1386. Most significantly for our purposes today, the Board also announced that 8(f) representatives would no longer be able to establish "conversion" to 9(a) status except by means of a Board-certified election, *id.* at 1383-85, or voluntary recognition based upon a clear showing of majority support. *Id.* at 1387 n.53.

Although the Supreme Court has yet to consider the *Deklewa* rules, a majority of the Courts of Appeals has done so and each, with the exception of our court, has ultimately adopted the *Deklewa* analytical framework in its entirety.[3]

---

[3] The Courts of Appeals for the First, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits have all adopted the *Deklewa* decision. See *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 735 (11th Cir. 1998); *NLRB v. Viola Indus. Elevator Div., Inc.*, 979 F.2d 1384, 1393-95 (10th Cir.) *(en banc)*; *C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB*, 921 F.2d 350, 357 (1st Cir. 1990); *NLRB v. Bufco Corp.*, 899 F.2d 608, 609, 611 (7th Cir. 1990); *NLRB v. W.L. Miller Co.*, 871 F.2d 745, 748 (8th Cir. 1989); *Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1129-34 (9th Cir. 1988) (*en banc*); *International Ass'n of Bridge,*

In this court's only previous consideration of these "new" rules, we held last year, in *Industrial Turnaround v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997), that we were "precluded from adopting Deklewa as the law of the Circuit because it stands in conflict with *Clark v. Ryan*, 818 F.2d 1102 (4th Cir. 1987), a prior panel opinion of this court." The question before us in *Industrial Turnaround*, however, was whether *Deklewa* effectively overruled the law of this circuit, established in *Clark*, that "a pre-hire agreement may be repudiated at any time by either party prior to the union's achievement of majority status." *Industrial Turnaround*, 115 F.3d at 254. Both *Clark* and *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 75 L. Ed. 2d 830, 103 S. Ct. 1753 (1983), the Supreme Court decision upon which *Clark* was based, likewise concluded only that "[a] section 8(f) prehire agreement is subject to repudiation until the union establishes majority status." *McNeff*, 461 U.S. at 271. None of these three decisions addressed the conversion doctrine at all, or, more broadly, the question of how an 8(f) union can obtain 9(a) representative status under the National Labor Relations Act. This question is thus one of first impression for this court. Accordingly, we are free to adopt the Board's construction of the Act on this score, provided it is reasonable. *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 at 409, 134 L. Ed. 2d 593, 116 S. Ct. 1396.[4]

Structural & Ornamental Iron Workers v. NLRB, 843 F.2d 770 (3rd Cir. 1988).

[4] We recognize that by adhering to our refusal in *Industrial Turnaround* to adopt the Board's position regarding unilateral repudiation, while at the same time embracing the Board's abandonment of the conversion doctrine, we would establish as the law of this Circuit a hybrid approach considered and rejected by the Board in *Deklewa*. Nonetheless, as we have explained, we are precluded from revisiting as a

B.

The Board abandoned the conversion doctrine because it concluded that the rule fostered neither industry stability nor employee free choice. The Board was correct that labor relations stability in the construction industry was one of the primary objectives of the 1959 amendments to the NLRA. See *McNeff*, 461 U.S. at 266 (reviewing legislative history of the 1959 Amendments and concluding that Congress in enacting section 8(f) sought to address instability created by the "uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry"); see also *Higdon*, 434 U.S. at 348-49 (discussing same history and concluding that section 8(f) "greatly convenienced unions and employers" by "accommodating the special circumstances in the construction industry"). *Cf. Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362, 94 L. Ed. 161, 70 S. Ct. 166 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National Labor Relations Act."). We believe that it was self-evidently reasonable for the Board to conclude in 1987, after more than fifteen years of experience attempting to implement and enforce the *R.J. Smith*

---

panel the Circuit's established precedent on the repudiation issue. And, in any event, as counsel for the Board explicitly stated at oral argument, this case does not require reconsideration of the rules governing an employer's unilateral repudiation of an 8(f) agreement during its term because the Board has not alleged any such action on the part of the Company. Thus, in this case we need only determine, as counsel persuasively urged, whether the Board's conclusions in *Deklewa* as to the means by which an 8(f) union can attain 9(a) status, thereby entitling it to "all the rights of a majority representative, including a presumption of majority support upon expiration of a collective bargaining agreement and the correlative duty to bargain with respect to a new contract," *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727, 731 (11th Cir. 1998), are permissible.

rules, that the statutory aim of labor relations stability was frustrated by a rule pursuant to which "an effective conversion [could] take place, without notice, at virtually any time after the signing of an 8(f) agreement, but where it may take years of fractious litigation to establish whether conversion actually did occur." *Deklewa*, 282 N.L.R.B. at 1383. *See also Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d at 1134 ("The [conversion] doctrine does not further industry stability. Its complex nature inevitably fosters litigation . . . to establish whether conversion ever took place, among whom, and at what time.").

At the same time, and perhaps most importantly, we believe that the Board also reasonably concluded that the conversion doctrine impeded the often competing statutory aim of protecting employee free choice by allowing proof of union membership to serve as an evidentiary proxy for union support, even where the very 8(f) agreement sought to be converted required union membership as a condition of employment. *Id.* at 1127. *Cf. Authorized Air Conditioning Co., Inc. v. NLRB*, 606 F.2d 899, 906 (9th Cir. 1979) ("It is well established that union membership is not always an accurate barometer of union support."). The text and statutory framework of the NLRA offer considerable support for the conclusion that the conversion doctrine was simply incompatible with the legislative goal of preserving employee free choice. While the Amendments to the Act were undoubtedly motivated, in large part, by Congress' desire to ensure stability in the construction industry, Congress was nevertheless careful in enacting section 8(f) to preserve its longstanding statutory policy of advancing employee free choice. *Cf. Higdon*, 434 U.S. at 346 ("As for section 8(b)(7), which, along with section 8(f), was added in 1959, its major purpose was to implement one of the Act's principal goals -- to ensure that employees were free to make

an uncoerced choice of bargaining agent."). As a result, Congress included in section 8(f) a proviso, the subsection's second, specifying that an 8(f) agreement may not act as a bar to employees' rights under section 9(c) and 9(e) to petition to "reject or change their collective-bargaining representative."[5] *Deklewa*, at 10. *Cf. Higdon*, 434 U.S. at 344 (explaining the purpose of the second proviso by noting that although "privileging unions and employers to execute and observe pre-hire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, . . . in no sense can it be portrayed as an expression of the employees' organizational wishes"). The conversion doctrine flouted the legislative purpose -- and language -- of the second proviso by allowing even instantaneous conversions (i.e., where the signing of an 8(f) agreement was accompanied by an existing majority employee complement) to result in full 9(a) status and the attendant "contract bar" to election challenge. *See NLRB v. Dominick's Finer Foods, Inc.*, 28 F.3d 678, 683 (7th Cir. 1994) ("Under the [contract bar] rule, a collective bargaining agreement protects an existing bargaining relationship from challenge for the contract term. . . . This rule was formulated by the Board in an effort to reconcile the NLRA's goals of promoting industrial stability and employee freedom of choice." (internal quotations and citation omitted)). Especially given that the conversion doctrine rendered the proviso's explicit language "nugatory," *Deklewa*, 282 N.L.R.B. at 1383,

---

[5] The second proviso reads in full:

Provided further: That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

we think it was eminently reasonable for the Board to abandon the doctrine, which as the Ninth Circuit has explained "rather than protecting the free choice of employees to choose or reject a union, . . . often prevented them from ever voting for or against a particular" representative. *Mesa Verde*, 861 F.2d at 1134.

Even as it jettisoned the conversion doctrine, the Board in *Deklewa* concluded that construction industry unions should not be disfavored in their ability to obtain the full protections--and presumptions -- of the Act. Accordingly, the Board established that 8(f) unions, like their counterparts in nonconstruction industries, would not be precluded from achieving 9(a)] status through either Board-certified election or voluntary recognition based upon a clear showing of majority support. *Deklewa*, 282 N.L.R.B. at 1387 n.53. Here, too, we believe that the Board's construction of the Act as it pertains to the ability of construction industry employees to choose their own collective bargaining representatives is a defensible one. There is nothing in either the text or the statutory framework of the Act that purports to limit in any way the rights of employees in the construction industry to designate and select their own bargaining representatives pursuant to section 9(a). The Board has long recognized that construction industry unions could obtain exclusive representative status before entering into a collective-bargaining agreement through the traditional means of Board-certified election or "by other voluntary designation, pursuant to Section 9(a)." *Island Const. Co.*, 135 N.L.R.B. 13 (1962). And, again, the text of 8(f), which in its second proviso protects the right of employees subject to an 8(f) agreement to reject or change their bargaining representatives through the Act's petition processes, supports the conclusion that Congress meant to preserve employee free choice in the construction

industry, as elsewhere. This interpretation of the section's text also finds support in the Supreme Court's acknowledgment in *Higdon* that a union party to an 8(f) agreement retained the ability to obtain full 9(a) representative status. *Higdon*, 434 U.S. at 349-50 (stating that "it is . .. undisputed that when the union successfully seeks majority support, the prehire agreement attains the status of a collective-bargaining agreement executed by the employer with a union representing a majority of the employees in the unit") (emphasis added)). Even at the time of the Supreme Court's decision in *Higdon*, it had long been established that a union could "successfully seek[ ] majority support" -- and thus attain 9(a) representative status -- not only through a Board-certified election, but also by means of voluntary recognition based on a clear showing of majority support. See, e.g., *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 23 L. Ed. 2d 547, 89 S. Ct. 1918 (1969); *United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 71, 100 L. Ed. 941, 76 S. Ct. 559 (1956).

Similarly, nothing in the legislative history of the Act can be read to suggest that Congress intended in any way to disadvantage construction industry employees in their attempts to organize or bargain collectively. In fact, Congress was in part motivated by concern that "construction industry unions often would not be able to establish majority support with respect to many bargaining units." *McNeff*, 461 U.S. at 266. *See also Higdon*, 434 U.S. at 345 (reviewing the legislative history of section 8(f) and concluding that "the Senate Report also noted that 'representational elections in a large segment of the industry are not feasible to demonstrate . . . majority status due to the short periods of actual employment by specific employers'" (citation omitted)). It is certainly reasonable to conclude that Congress, in attempting to enable construction industry employees to reap the benefits of

collective-bargaining, did not at the same time intend to strip those employees of the full protections of the Act where they were "able to establish majority support." Thus, the Board's construction of the Act conforms to both its text and legislative history, as well as to Supreme Court dicta interpreting the same.

Because we agree with the Board that the conversion doctrine impeded the Act's principal aim of advancing employee free choice, and because we can discern nothing in either the text or legislative history of the 1959 amendments or, for that matter, the statutory framework of the Act, to suggest that employees in the construction industry should in any way be disfavored in their ability to secure union representation or the Act's protections, we accept as reasonable and adopt the Board's interpretation that 8(f) unions can attain full 9(a) status only through the traditional means available to unions in nonconstruction industries.

C.

Because the Board does not argue that either Local 669 or 536 attained 9(a) status through a certified election, we turn therefore to the question whether either satisfied the requirements for attaining such exclusive representative status through voluntary recognition.[6] In considering claims

---

[6] The Board argues that American's challenge to the Locals' 9(a) status is time-barred because it occurs more than six months after voluntary recognition was granted. In *Casale Indus.*, 311 N.L.R.B. 951, 953 (1993), the Board held that "a challenge to majority status must be made within a reasonable period of time after Section 9(a) recognition is granted." The Board based its ruling in *Casale* on the language of section 10(b), 29 U.S.C. @ 160(b), "that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the

filing of the charge with the Board," the fact that in cases involving nonconstruction industries, the Board will not entertain a claim that majority status was lacking at the time of recognition if more than six months have elapsed, *Casale*, 311 N.L.R.B. at 953, and its conclusion in *Deklewa* that "unions in the construction industry should not be treated less favorably than those in nonconstruction industries." *Id.* American counters that under the NLRA, only the General Counsel of the Board can issue "complaints," and that 10(b) can therefore only bar untimely complaints filed by the Board.

American is correct that the two controlling authorities on which intervenor Local 669 primarily relies, *Lodge No. 1424 v. NLRB (Bryan Mfg.)*, 362 U.S. 411 (1960), and *NLRB v. Harvey Hubble, Inc.*, 783 F.2d 1121 (4th Cir. 1986), involved application of the six-month time bar to complaints filed by the General Counsel. Anticipating this objection, Local 669 claims additional support from the decisions of the Courts of Appeals for the Tenth and Eleventh Circuits applying the *Casale* rule to bar construction industry employer defenses to refusal-to-bargain charges. See *National Labor Relations Board v. Triple A Fire Protection*, 136 F.3d 727, 737 (11th Cir. 1998); *MFP Fire Protection, Inc. v. NLRB*, 101 F.3d 1341 (10th Cir. 1996). *See also NLRB v. Viola Industries Elevator Div.*, 979 F.2d 1384, 1387 (10th Cir. 1992) (applying the 10(b) time bar to an employer's affirmative defense that its grant of voluntary recognition was the product of unlawful coercion).

It is not immediately clear to us that the Board's rule applying the 10(b) time-bar to nonconstruction industry employer defenses of invalid voluntary recognition is a reasonable construction of a provision that, on its face, applies only to complaints filed by the Board. However, we need not decide that question today. Even assuming, arguendo, that the rule as applied to employers in nonconstruction industries is reasonable, we find that it is not so in the construction industry context. As one Board member recognized in *Triple A Fire Protection, Inc.*, 312 N.L.R.B. 1088, 1089 n.3 (1993), "the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition." *Id.* at 1089 n.3. Thus, in the nonconstruction industries, a defense of invalid voluntary recognition is tantamount to a charge of unlawful conduct under the NLRA

of "conversion" through voluntary recognition, both the Board and reviewing courts have required "the union's unequivocal demand for, and the employer's unequivocal grant of, voluntary recognition as the employees' collective-bargaining representative based on the union's contemporaneous showing of majority employee support." *NLRB v. Goodless Elec. Co., Inc.*, 124 F.3d 322, 324 (1st Cir. 1997) (citing *James Julian, Inc.*, 310 N.L.R.B. 1247, 1252 (1993)); see also *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 979-80 (1988); *J & R Tile, Inc.*, 291 N.L.R.B. 1034 (1988); *American Thoro-Clean*, 283 N.L.R.B. 1107, 1108-09 (1987). The Board has required that the demand for and grant of voluntary recognition be unequivocal because of the potential for confusion in the construction industry over which type of relationship -- 8(f) or

---

provisions prohibiting employers and nonmajority unions from entering into collective-bargaining agreements. This is not the case in the construction industry, where 8(f) itself establishes the legality of such relationships.

The Board's single sentence in *Deklewa* that "nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than . . . those outside the construction industry," Deklewa, 282 N.L.R.B. at 1387 n.53, cannot suffice as a response to this critical distinction. The Board itself recognized as much shortly after *Deklewa*, when it held that it had not in that case upset the rule of *R.J. Smith* that nothing in 10(b) or *Bryan Mfg.* "precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period . . . [where] going back to the beginning of the parties' relationship here simply seeks to determine the majority or nonmajority based nature of the current relationship." *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 982 (1988). Recent decisions of the Board and of the Tenth and Eleventh Circuits to the contrary notwithstanding, we do not believe that section 10(b) can reasonably be interpreted to prohibit American, the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective voluntary recognition that is the basis of the Board's complaint.

9(a) -- the parties intended to create by entering into the collective-bargaining agreement. The requirement of a contemporaneous showing of majority support, on the other hand, is not unique to the construction industry, and is consistent with the standard for voluntary recognition in the nonconstruction trades. See, e.g., *NLRB v. Lyon & Ryan Ford, Inc.*, 647 F.2d 745, 751 (7th Cir. 1981) ("The essence of voluntary recognition is the commitment of the employer to bargain upon some demonstrable showing of majority (status)." (citation and quotation marks omitted)); *Georgetown Hotel v. NLRB*, 266 U.S. App. D.C. 371, 835 F.2d 1467, 1470 (D.C. Cir. 1987) ("Voluntary recognition has been found to have occurred when an employer agrees to recognize a union through a card check or some other procedure and subsequently confirms the union's majority status through that procedure.").

We reverse the Board's finding of an effective voluntary recognition of Local 669's 9(a) status because we believe that that finding was based on an unreasonable construction of the Act. In support of its concededly clear and unequivocal initial demand for voluntary recognition, Local 669 included fringe benefit reports demonstrating that a majority of the Company's employees in the relevant jurisdiction were members of the Local. American contends, however, that these fringe benefit forms cannot suffice to satisfy the requirement of a contemporaneous showing of majority support because the parties' 8(f) contract included a standard union security clause requiring employees, as a condition of employment, to join the union within seven days of being hired. Where a union security clause is in effect, petitioner argues, an employee's obligatory membership in the local cannot be equated with -- and certainly cannot be taken as dispositive of -support for the union. We agree.

Prior to its decision in *Deklewa*, the presence of a strictly-enforced union security clause in an 8(f) contract was one of the evidentiary factors the Board often cited as proof of conversion to 9(a) status. See *Deklewa*, 282 N.L.R.B. at 1378. Even before *Deklewa*, however, at least one court of appeals had determined that majority union membership pursuant to an enforced union security clause was insufficient as a matter of law to establish effective conversion. *Precision Striping, Inc. v. NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981) (noting that "[a] union security clause operates to compel new employees to join the union, because union membership is the price for obtaining a job," and that "it is well established that union membership is not always an accurate barometer of union support" (internal quotations and citations omitted)). In *Deklewa* itself, the Board not only recognized the unreliability of union membership as a proxy for union support where a security clause is in effect, but in fact based its decision to abandon the conversion doctrine in part on the "highly questionable" nature of just such an inference. *Deklewa*, 282 N.L.R.B. at 1384.

The Board's reluctance in *Deklewa* to permit a union to obtain 9(a) status on the basis of such questionable evidence of majority support rested on its commitment, and that of Congress, to the protection and advancement of employees' free choice in designating and selecting their bargaining representatives. *Id.* at 1383. The Board observed in *Deklewa* that, by declaring in the second proviso of section 8(f) that a pre-hire agreement "shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)," 29 U.S.C. section 158(f), "Congress sought to assure that the rights and privileges accorded employers and unions in the body of Section 8(f) would not operate to thwart or undermine construction industry employees' representational desires." *Deklewa*, 282 N.L.R.B. at 1381. Yet the Board now concludes that the same statutory

objective of employee free choice that justified its abandonment of the conversion doctrine is satisfied by the employer's voluntary recognition of the union on the basis of the very same evidentiary factor the Board rejected as insufficient in *Deklewa*. This construction of the Act simply is not rational. See Precision Striping, 642 F.2d at 1148. The effect of the Board's construction would be to allow nonmajority unions to enter into 8(f) collective-bargaining agreements containing union security clauses and then bootstrap themselves, within a matter of days and with the complicity of the employer, into the full 9(a) status reserved under the Act for representatives that have in fact secured and demonstrated majority support. As the Board recognized in *Deklewa*, such 9(a) status entails an irrebuttable presumption of majority status during the contract's term that, under Board rules, bars the very election petitions 8(f)'s second proviso explicitly contemplates. Consistent with the Board's own logic in *Deklewa*, we cannot conclude that an interpretation of 8(f) is reasonable that "effectively renders [its] second proviso nugatory." *Deklewa*, 282 N.L.R.B. at 1382. As the Board observed in that case, "such [a] rule[ ] hardly advances the objective of employee free choice."[7] *Id.*

---

[7] The Board's decision to credit American's voluntary recognition of the union's majority status based upon fringe benefit reports showing majority membership is not only an unreasonable interpretation of the NLRA, it is inconsistent with the rationale the Board provided in *Deklewa* for allowing voluntary recognition of 9(a) status in the 8(f) context at all. The Board stated in *Deklewa* that, in permitting construction unions to achieve 9(a) status through voluntary recognition based on a clear showing of majority support among the unit employees, it intended simply to guarantee that these unions would not have "less favored status" under the NLRA than those in nonconstruction industries. *Deklewa*, 282 N.L.R.B. at 1387 n.53. However, the rule established by the Board in this case would in fact elevate construction unions to a privileged position vis-a-vis nonconstruction unions with regard to their

As for Local 536, we conclude that there was not substantial evidence in the record to support the Board's conclusion that the relationship between the NFSA -- and therefore American -- and Local 536 ever attained 9(a) status. The Board rested its affirmance of the ALJ's finding of 9(a) status through voluntary recognition on two pieces of evidence in the record. First, the Board pointed to American's assent to language in its multi-employer bargaining representative's contract with the Local recognizing it "as the sole and exclusive bargaining representative for all journeymen sprinkler fitters . . . in the employ of said employers, . . . pursuant to section 9(a) of the National Labor Relations Act." Second, the Board relied upon testimony that the union, in negotiating its 1991 collective-bargaining agreement, asked the Association whether there was any dispute that the Local "represented a majority of the employees," and received a negative reply. *American Automatic Sprinkler Systems, Inc.*, 323 NLRB 160 (1997).

---

ability to achieve 9(a) recognition and protection. That is, it is only by virtue of the 8(f) exception that construction unions which have not yet established majority status are permitted not only to enter into collective-bargaining agreements, but to include union security clauses in those agreements. 29 U.S.C. section 158(f). In the nonconstruction industries, it has long been a violation of the Act for unions and employers to include such clauses in their agreements before majority support is established. *Bryan Mfg.*, 362 U.S. at 413 ("It is an unfair labor practice for an employer and a labor organization to enter into a collective-bargaining agreement which contains a union security clause, if at the time of original execution the union does not represent a majority of the employees in the unit."). Because voluntary recognition in both construction and nonconstruction industries must be based on an actual showing of majority support, acceptance of union membership pursuant to a union security clause as determinative of such support would give 8(f) unions a considerable advantage over their nonconstruction counterparts in attaining full 9(a) status.

As an initial matter, the language to which the employer concededly consented in the multiemployer collective-bargaining agreement is conclusory, and evidences neither an "unequivocal demand for" nor "unequivocal grant of" voluntary recognition based upon a contemporaneous showing of majority support. In fact, the form does not even purport to establish recognition of the local as the majority representative, but rather only as the "sole and exclusive" representative. The Board's reliance on "the uncontradicted evidence . . . that during 1991 negotiations for article 3, Local 536 specifically asked the Association whether there was any dispute that it represented a majority of the employees . . . [and] the Association responded that there was no dispute," *id.* (emphasis added), is equally unavailing. The "uncontradicted evidence" to which the Board refers is union negotiator Roy Fique's testimony about his 1991 negotiations with the NFSA. That testimony read literally, however, supports a proposition directly at odds with the one the Board advances. Mr. Fique characterized the exchange between himself and bargaining representatives of the NFSA as follows:

> So in bargaining, I brought that up, is there any dispute that we are, you know, the representative of the employees, and everybody at the table agreed that there was no doubt in their mind that we represented the minority of employees.

J.A. at 438 (testimony of Roy Fique) (emphases added). It may be that this was either a misstatement by Fique or a transcription error. However, this statement, which on its face is an assertion of unanimous and unequivocal agreement as to the Local's minority status, is literally the only evidence with which we have been presented that supports a conclusion that

the union unequivocally demanded and received recognition as the majority representative. When not even the parties themselves are in a position to represent that this statement was a misstatement or transcription error, and neither the ALJ nor the Board ever addressed the apparent discrepancy, we simply cannot conclude that, without more, it can suffice as a union's "unequivocal demand for" and the employer's "unequivocal grant of" voluntary recognition of majority status.

As for the requirement of a "contemporaneous showing of majority support," there is simply no evidence at all in the record to support a finding that it has been satisfied. Again, the Board can cite only the exchange between Fique and the NFSA negotiators. Even were the Board's characterization of Fique's testimony accurate, this conversation, while perhaps probative of the Company's willingness to recognize the union as the majority representative, does not support the suggestion that its grant of voluntary recognition was based, in fact, upon any showing of majority support, contemporaneous or otherwise. Fique's unsubstantiated request for recognition as the "majority" representative, so understood, cannot be transformed into the required substantiation itself.

The Board's willingness to credit the employer's voluntary recognition absent any contemporaneous showing of majority support would reduce this time-honored alternative to Board-certified election to a hollow form which, though providing the contracting parties stability and repose, would offer scant protection of the employee free choice that is a central aim of the Act. *Cf. Higdon*, 434 U.S. at 349 ("Privileging unions and employers to execute and observe pre-hire agreements in an effort to accommodate the special circumstances in the construction industry may have greatly convenienced unions and employers, but in no sense can it be

portrayed as an expression of the employees' organizational wishes."). In considering the Board's finding on this issue, we must concur with the Board's General Counsel that, even if the union does, in fact, represent a majority of the Employer's employees, . . . there must be explicit proof presented contemporaneously with the Union's demand and the Employer's voluntary recognition. Thus, although the Employer's ambiguous statements arguably may indicate that it believed the Union had majority support, those statements are insufficient to confer 9(a) status upon the Union without actual demonstration of that majority status. Advice Ltr. from NLRB-Gen. Counsel to Regional Director of Region 9, Feb. 27, 1989, 1989 WL 241614, at 2. (Feb. 27, 1989).

Accordingly, because we cannot conclude, consistent with the principles outlined a decade ago by the Board in *Deklewa* and accepted by us today, that petitioner had an obligation under the Act to bargain with either Local 669 or 536 upon the expiration of their respective multiemployer agreements, we grant American's petition for review as to the findings that it violated 8(a)(5) and (a)(1) by failing to bargain in good faith, unilaterally changing terms and conditions of employment, and dealing directly with employees.

III.

Our holding above that the employer had no statutory obligation to refrain from making unilateral changes to the conditions of employment disposes of the Board's findings of constructive discharge. Because each of these findings was premised on an employee resignation resulting from the employer's assertedly unlawful change to the conditions of employment, our conclusion that those changes were in fact lawful negates these findings completely. Accordingly, we

grant American's petition for review of the Board's findings of constructive discharge. Finally, we deny American's petition for review with respect to the Board's findings of section 8(a)(3) and (a)(1) violations arising out of the discriminatory discharges, refusals to hire and reinstate, and imposition of onerous working conditions. There is ample record evidence of American's anti-union animus and its efforts to rid its workforce of active union members, despite those individuals' demonstrated qualifications and in the face of repeated contractor complaints about American's unsatisfactory job performance on account of labor shortages. Based upon a careful review of the record, we conclude that there was substantial evidence, particularly in light of the deference due the ALJ's credibility determinations, to support each finding of a section 8(a)(3) and (a)(1) violation as a result of a discriminatory discharge, refusal to hire or reinstate, or imposition of onerous working conditions.

CONCLUSION

For the foregoing reasons, we grant in part and deny in part American's petition for review of the Board's findings and order, grant in part and deny in part the Board's cross-petition for enforcement of its order, and remand for a remedial order consistent with this opinion.

IT IS SO ORDERED.

APPENDIX B

American Automatic Sprinkler Systems, Inc. and Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and Road Sprinkler Fitters Local Union No. 669, U.A., United Association Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and Todd M. Hood and Joseph R. Brown Jr. and Laurence S. Davidson and Fred D. Kraeuter and Stephen M. Paca and Richard L. Newsome and Roy C. Rife Jr. and Ralph Kelly Preuett and Todd C. Rife and Warren L. Bentert and Michael Ford

Cases 5-CA-24636, 5-CA-24681, 5-CA-24719, 5-CA-25047, 5-CA-24738, 5-CA-24895, 5-CA-25029, 5-CA-24641, 5-CA-24642, 5-CA-24647, 5-CA-24674, 5-CA-24695, 5-CA-24715, 5-CA-24896, 5-CA-25017, 5-CA-25075, 5-CA-25130, and 5-CA-25255

June 11, 1997

DECISION AND ORDER

By William B. Gould IV, Chairman; Sarah M. Fox, Member. John E. Higgins, Jr., Member, dissenting in part.

On February 26, 1996, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel and Charging Party Road Sprinkler Fitters

Local Union No. 669 each filed cross-exceptions and supporting briefs, to which the Respondent filed an answering brief.

The Board has considered the decision (We correct the judge's following inadvertent errors: In sec. II,F,b,(2), par. 6, "January 23" and "January 29" should read, "August 23" and "August 29," respectively; in sec. II,E,3, in the penultimate paragraph concerning employee Kraeuter, it was 15 days after Kraeuter submitted his "application," not his "affidavit;" finally, in sec. II,F,1,c, under the heading "Warren Bentert, "the reference in the first paragraph should be to "Local 536," not "Local 635.") and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, as explained and modified below, and to adopt the recommended Order as modified.[2]

1. We agree with the judge's findings that Locals 669 and 536 are the 9(a) representatives of the Respondent's journeymen sprinkler fitters and apprentices within each Local's specific geographic jurisdiction. As to Local 536, we find that this

---

[1] The respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Dry Wall*, 91 N.L.R.B. 544 (1950), *enf'd* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order and notice to reflect the additional violations, discussed herein, and to comport with our recent decision in *Indian Hills Care Center*, 321 N.L.R.B. 144 (1996).

status is based on the language that the Respondent's then bargaining representative--the National Sprinkler Fitters Association (the Association)--negotiated in the parties' 1991-1994 collective-bargaining agreement:

ARTICLE 3

RECOGNITION: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all journeymen sprinkler fitters and apprentices in the employ of said employers, . . . pursuant to section 9(a) of the National Labor Relations Act.

Further, the uncontradicted evidence establishes that during 1991 negotiations for article 3, Local 536 specifically asked the Association whether there was any dispute that it represented a majority of the employees. The Association responded that there was no dispute.

As to Local 669, in October 1987, the Respondent signed a form recognition agreement--which was accompanied by fringe benefit forms demonstrating majority union membership--recognizing Local 669 as the 9(a) representative of its unit employees. The Board has previously found that this same form agreement is sufficient to establish 9(a) status. *See, e.g., Triple A Fire Protection*, 312 N.L.R.B. 1088 (1993). In addition, in 1988, the Respondent executed an interim agreement with Local 669 verifying that this Local was the 9(a) representative. Further, the parties' 1991-1994 collective-bargaining agreement contains the identical article 3 recognition language, discussed as to Local 536, above.

Finally, we note that, in any event, the Respondent's challenge to the 9(a) status of Locals 669 and 536 was untimely raised. *Casale Industries*, 311 N.L.R.B. 951 (1993).

2. The General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(1) when: (1) its superintendent, Forsythe, told employee Bentert, about January 19, 1995, to stop talking to employees about his rate of pay; (2) its owner and president, Bolyard, told employee Sampson, about August 10, 1994, that the Respondent was going nonunion;[3] and (3) its agent, secretary/receptionist Goldbeck, told employee Kraeuter, about August 14, 1994, that the Respondent was going nonunion. We find merit to these exceptions. The General Counsel alleged that each of these statements violated Section 8(a)(1). The allegations were fully litigated, and the judge specifically found that each of the alleged statements was made. In these circumstances, and because the statements clearly interfere with employees' Section 7 rights, we will modify the judge's recommended Order to address these additional 8(a)(1) violations. *See, e.g.*, *Worcester Mfg.*, 306 N.L.R.B. 218, 219 (1992); *Waco, Inc.*, 273 N.L.R.B. 746, 747-748 (1984).

3. The judge found that, in March 1995, the Respondent violated Section 8(a)(3) and (1) by constructively discharging employee Ford, a Local 536 member. The judge found that the Respondent unlawfully required Ford either to resign from work or to accept an assignment at Dulles Airport, outside Local 536's jurisdiction.

In its exceptions the General Counsel contends, inter alia, that the judge erroneously failed to find similarly that, in January

---

[3] Charging Party Local 669 filed a similar exception.

1995, the Respondent violated Section 8(a)(3) and (1) by issuing a disciplinary warning to employee Bentert for refusing an assignment outside Local 536's jurisdiction. For the following reasons, we find merit to the General Counsel's exception, and conclude that both the constructive discharge of Ford and the written warning to Bentert violated the Act.

Initially, we note that under Local 536's 1991-1994 collective-bargaining agreement with the Respondent, the contractual geographic jurisdiction for work assignments consisted of the City of Baltimore, Maryland, and 10 surrounding miles. Consistent with this provision, the Respondent assigned employees represented by Local 536 to work within this territory. Employees in the Local 536 bargaining unit testified that, during the term of the 1991-1994 agreement, the Respondent never asked them to work outside the Local's geographic jurisdiction or, if it did, the Respondent never required them to accept such extraterritorial assignments. Similarly, the Respondent admitted that although, under the 1991-1994 agreement, it had sometimes asked employees represented by Local 536 to work outside their Local's jurisdiction on short-term jobs, it was required to obtain the Union's approval before assigning those employees to long-term projects outside Local 536's jurisdiction (like the Dulles Airport and Patuxent River jobs, discussed below).[4]

---

[4]Although there is some dispute as to the words Bentert used in refusing the Respondent's assignment, the Respondent concedes, on brief, that the terminology used was immaterial to the discipline. The Respondent asserts that Bentert was disciplined because he was "profoundly uncooperative" when responding to the southern Maryland assignment. Because the Dulles and Patuxent jobs were in Local 669's contractual jurisdiction, the Respondent testified that it would have to reach an agreement with both locals before Local 536-represented employees could be assigned the work.

During negotiations for a successor to the 1991-1994 contract, the Respondent proposed a six-item successor agreement which, as found by the judge, eliminated Local 536's territorial jurisdiction, permitted the Respondent to operate nonunion, and ensured that Local 536 would have no role in representing its unit employees. In August 1994, the Respondent prematurely declared an impasse in bargaining and unlawfully implemented its six-item proposal. In so doing, the Respondent, among other things, violated Section 8(a)(5) and (1) by nullifying Local 536's territorial, work-assignment jurisdiction. Thereafter, the Respondent admittedly assigned Local 669 work to Local 536 unit employees Ford and Bentert, which assignment was in further derogation of the contractual geographic restrictions.

Specifically, in March 1995, the Respondent assigned employee Ford to work at its Dulles Airport job, located in Local 669's jurisdiction. Ford protested this assignment, first arguing that Local 669 was on strike against another employer, and then requesting an assignment within Local 536's Baltimore jurisdiction. The Respondent rejected Ford's request, stating that it was not a union shop. The Respondent also gave Ford the ultimatum of accepting the Dulles assignment or resigning. Ford quit.

In these circumstances, we find that the Respondent presented Ford with the "Hobson's choice" of resigning or working under conditions in derogation of his contractual bargaining rights. *See, e.g., RCR Sportswear*, 312 N.L.R.B. 513 (1993), *enf'd.* in unpublished decision 37 F.3d 1488 (3d Cir. 1994). Thus, by accepting the Dulles assignment, Ford would relinquish his contractual right to be represented by Local 536 under that local's negotiated wages and benefits. Further, by

acceding to the Respondent's ultimatum, Ford would be forced to accept an assignment in derogation of Local 536's contractual, territorial jurisdiction.

On the same basis, we find that the Respondent violated Section 8(a)(3) and (1) by disciplining employee Bentert for refusing an assignment outside Local 536's jurisdiction.[5]

In January 1995, while Bentert was working at a Baltimore jobsite, the Respondent directed him to report to its Patuxent River job in southern Maryland. Bentert protested the assignment, first stating that it would require him to commute to work more than 2 hours each way and later asking the Respondent whether it had work for him in Local 536's jurisdiction.[6] Although the Respondent subsequently found

---

[5] The consolidated complaint alleged that the Respondent unlawfully disciplined Bentert in January 1995. The circumstances of this discipline were fully litigated at the hearing. Further, the judge specifically found that Bentert refused the Respondent's January effort to assign him outside Local 536's jurisdiction to its Patuxent River job in southern Maryland. The judge failed to additionally find, however, that Bentert's refusal resulted in disciplinary action or that this discipline violated the Act.

We agree with the General Counsel that the record establishes that Bentert was issued a written warning for refusing the Patuxent River assignment (G.C. Ex. 37). Indeed, the Respondent concedes this fact. Further, as discussed below, we find that this warning was in derogation of Bentert's Sec. 7 rights to be represented by Local 536 and was yet a further unlawful effort by the Respondent to abrogate Local 536's contractually established geographic jurisdiction.

[6] Although there is some dispute as to the words Bentert used in refusing the Respondent's assignment, the Respondent concedes, on brief, that the terminology used was immaterial to the discipline. The Respondent asserts that Bentert was disciplined because he was

another employee for the southern Maryland job, it issued a written warning to Bentert for refusing the assignment.

As with Ford, we find that this warning was in derogation of Bentert's Section 7 rights to be represented by Local 536 under the terms and conditions of its collective-bargaining agreement with the Respondent, including the geographic jurisdiction provision. Accordingly, we find that the warning violated Section 8(a)(3) and (1) of the Act.

4. Finally, the General Counsel excepts to the judge's failure to find that the Respondent violated Section 8(a)(3) and (1) by both suspending and discharging employee William Bentert in February 1995. Although we adopt the judge's finding that Bentert's February 14 suspension was not unlawful, we reverse and find that the February 20 discharge violated the Act.

Initially, we find that the General Counsel established a compelling prima facie case, under *Wright Line*,[7] that the decisions to suspend and discharge Bentert were unlawfully motivated. Thus, prior to this discipline, the Respondent committed serious and extensive unfair labor practices, including bad-faith bargaining, numerous unilateral changes, and the discharge, refusal to hire, and constructive discharge of 27 union-represented employees. Further, some of the Respondent's unlawful conduct was directed specifically at Bentert, an outspoken Local 536 member and supporter. In August 1994, the Respondent unlawfully rescinded Bentert's

---

"profoundly uncooperative" when responding to the southern Maryland assignment.

[7] *Wright Line*, 251 N.L.R.B. 1083 (1980), *enf'd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982).

privilege of using a company vehicle. The following January, after Bentert complained to fellow workers about being reassigned from a union scale to a lower paying job,[8] the Respondent unlawfully instructed Bentert not to discuss his wage rate with other employees. And, in late January, the Respondent unlawfully issued a written disciplinary warning to Bentert for refusing an assignment outside Local 536's contractual, geographic jurisdiction. Significantly, these January 1994 violations occurred within a few weeks of Bentert's suspension and discharge, at a time when he was the sole Local 536 member employed by the Respondent at the FANX jobsite. The Respondent had fired or constructively discharged all other Local 536 members assigned to that job during the preceding 5-month period.

Notwithstanding this prima facie case, the judge found, and we agree, that the Respondent established that it would have suspended Bentert on February 14, 1994, even in the absence of Bentert's union and protected activities. Thus, after Bentert left the FANX job-site early on January 19 and 26, 1995, to cash his paycheck,[9] Job Superintendent Forsythe told him that he could not leave work early for this purpose. Notwithstanding this instruction, on February 10, Bentert again announced that he was leaving early to cash his check. When Bentert's

---

[8] During January, Bentert also told coworkers and his supervisor, Reid, that employees would not be earning different amounts if they were covered by a union contract, and that Local 536 had a bonding requirement that would prevent their checks from bouncing because of insufficient funds.

[9] Both Bentert and employee Todd Rife left early on these dates to cash their checks after some company paychecks bounced. We adopt the judge's finding that the subsequent discharge of Todd Rife violated Sec. 8(a)(3) and (1).

supervisor, Reid, directed him to telephone the office first, Bentert disregarded this instruction and, as found by the judge, "refused and persisted in leaving early without calling the office for permission." In view of Bentert's "defiant insistence on leaving work to cash" his paycheck, we agree with the judge that the Respondent carried its burden of proving that it would have suspended Bentert regardless of any union activity.

We do not adopt the judge's further finding, however, that the Respondent similarly met its burden as to the discharge decision.[10] Thus, although the February 14 disciplinary notice stated that Bentert was suspended for 4 days "pending further investigation, which may result in permanent discharge," the Respondent's witnesses established that the discharge decision was separately made, and was based on events beyond the February 10 check-cashing incident. Moreover, as set forth below, according to one, if not both, management officials who claimed responsibility for the discharge decision, Bentert was discharged, in part, for his protected activities.

Superintendent Forsythe, the Respondent's manager on the FANX jobsite, testified that he made the decision to terminate Bentert. Although Forsythe initially stated that he based his decision solely on Bentert's February 10 conduct, which Forsythe characterized as "uncooperative" and "disruptive," Forsythe later conceded that "uncooperative" also encompassed Bentert's January 1995 refusal to accept an assignment outside Local 536's jurisdiction, and "disruptive" included Bentert's constant complaints about the company. Thus, by Forsythe's

---

[10] The judge did not separately analyze the suspension and discharge decisions, nor did he discuss the testimony of Respondent witnesses Forsythe and McCusker, discussed below.

admission, Bentert was discharged, in part, for engaging in protected activity.

Forsythe, however, was not the only Respondent official claiming responsibility for the discharge decision. Vice President McCusker--Forsythe's superior--testified that while he relies on information from his on-site managers, like Forsythe, when making personnel decisions, he ultimately authorizes discharges.[11] McCusker testified that he decided to discharge Bentert because of the February 10 check-cashing incident, because Bentert "didn't want to work there anyway," and since--during Bentert's 4-day suspension, "the job site was happy, we were happy. . . . If I could reinstate him, it would go back to the same misery."

Based on the foregoing testimony of Forsythe and McCusker, we find that the Respondent has not met its burden of establishing that it would have discharged Bentert regardless of his union or protected activities. On the contrary, when claiming credit for the discharge, Forsythe admitted that, in part, it was motivated by protected activity. Although McCusker also asserted responsibility for the discharge decision, he admittedly depends on managers when making personnel decisions, and did not deny relying on Forsythe's recommendation when authorizing Bentert's discharge. Further, even assuming that McCusker independently decided to terminate Bentert, he presented shifting reasons for the

---

[11] Specifically, McCusker testified that "I ultimately authorize the decision, but I don't make job site eye-to-eye observations constantly. I hear it through my eyes and ears on the job, which are people, foreman (sic), superintendents. And I ultimately make the decision not to reinstate them."

discharge.[12] Moreover, McCusker's reference to jobsite "misery" caused by Bentert, and the jobsite's "happiness" during Bentert's suspension--when considered in the context of the Respondent's union animus and Bentert's status as a vocal union supporter who openly complained about wages, working conditions, and the Respondent's unlawful unilateral changes--appears to be yet another reference to Bentert's protected activities.

In all of these circumstances, and in light of the compelling prima facie case, we find that the Respondent has not established that it would have converted Bentert's suspension into a discharge in the absence of his union and protected activities. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by terminating Bentert on February 20, 1994.

ORDER

The National Labor Relations Board orders that the Respondent, American Automatic Sprinkler Systems, Inc., Owing Mills, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Refusing to bargain in good faith with Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe

---

[12] As argued by the General Counsel, McCusker stated for the first time at the conclusion of the hearing that he decided not to reinstate Bentert from suspension because Bentert told him in a telephone conversation that he really did not want to work for the Respondent.

Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 536, excluding office clerical employees, guards, and supervisors as defined in the Act.

(b) Refusing to bargain in good faith with Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 669, excluding office clerical employees, guards, and supervisors as defined in the Act.

(c) Bypassing Local 536 and Local 669 and dealing directly with employees in the bargaining units in derogation of the Locals' status as exclusive bargaining representatives of the employees.

(d) Making unilateral changes in mandatory subjects of bargaining in the respective bargaining units until it and the Local representing each unit either agree on a new contract or reach a good-faith impasse in negotiations.

(e) Unilaterally changing the scope of the Local 536 and 669 bargaining units by creating a "helper" classification outside the bargaining units without the Locals' consent or by nullifying

the separate bargaining units based on the Locals' territorial jurisdictions.

(f) Assigning bargaining unit work to employees outside the bargaining units.

(g) Discharging, constructively discharging, denying overtime, imposing more onerous or rigorous working conditions, denying privileges, warning, or otherwise discriminating against any employee because of his membership or activity on behalf on Local 536, Local 669, or any other labor organization.

(h) Refusing to hire or reinstate employees because of their membership in Local 536, Local 669, or any other labor organization.

(i) Informing any employee that he could not work as a foreman because of his union affiliation.

(j) Making an implied promise to any employee of a higher wage rate if he resigned his union card.

(k) Instructing any employee not to discuss his rate of pay with other employees.

(l) Informing any employee that the Respondent was going nonunion while its employees were represented by a majority representative.

(m) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Local 536 and Local 669 as the exclusive representatives of the employees in their respective appropriate bargaining units concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) On request of Local 536 and Local 669, on behalf of their respective units, rescind any or all unilateral changes in mandatory subjects of bargaining implemented on and after August 11, 1994, and restore the working condition or conditions retroactive to that date.

(c) On request, remit any payments it owes the Locals' health and pension funds and make whole its employees for any losses directly attributable to the cancellation of these benefits, in the manner set forth in the remedy section of this decision.[13]

(d) Within 14 days from the date of this Order, offer the following employees immediate employment in their former jobs or the jobs to which they would have been assigned or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed--displacing if necessary employees assigned to the jobs and placing any remaining employees on

---

[13] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

a preferential list as provided for in the remedy section of the decision:

William Bentert
James Birmingham
Steven Bloodsworth
Joseph Brown
Stefan Buitron
Howard Crosby
Laurence Davidson
Edward Gnip
Stephen Griffith
Robert Grimm
Melvin Haynes
Todd Hood
Frederick Kraeuter
Jimmie Love
Stephen Paca
Kelly Preuett
David Rehbein
Roy Rife
Todd Rife
Ronald Rutkowski
Clarence Sampson
Scott Dyott
Michael Ford
Ronald Moyers
Richard Newsome
Edward Saunders
James Spitzer
Steven Stricker

(e) Make whole employees listed above for any loss of earnings and other benefits suffered as a result of the

discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order remove from its files any reference to the unlawful warning and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the warning and discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Owings Mills, Maryland, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

---

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 10, 1994.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 11, 1997

William B. Gould IV, Chairman

Sarah M. Fox, Member

DISSENT:
John E. Higgins, Jr., Member, dissenting in part.

I do not agree that employee Ford's quitting of his job constituted a constructive discharge. In this regard, I note that Respondent decided to assign Ford from the Baltimore unit (represented by Local 536) to the Dulles Airport unit (represented by sister Local 669). There is no allegation that this assignment was unlawfully motivated. Thus, although the transfer would have resulted in Ford's being represented by Local 669, rather than Local 536, there is no allegation that this was the motive for the decision to transfer.

Further, although the transfer may have been in breach of the Local 536 contract, this was not the reason for Ford's refusal to accept the assignment. Rather, Ford protested that he did not want to go to Local 669 because that Local was on strike, albeit against another employer, not Respondent.

Ford continued to resist the assignment and, not achieving his goal, quit his employment.[1] In these circumstances, I would not find an unlawful constructive discharge.[2]

Dated, Washington, D.C. June 11, 1997

John E. Higgins, Jr., Member

ALJ: MARION C. LADWIG

ALJ-DECISION:

Statement of the Case

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Baltimore, Maryland on June 5-9, 12-15, 1995. The charges were filed from August 11, 1994[1] through April 5, 1995 and the complaints were issued and consolidated from November 4 through May 19, 1995.

---

[1] By contrast, employee Bentert did not quit. I agree that Respondent violated the Act by disciplining Bentert in reprisal for the Sec. 7 right of protesting the assignment.

[2] I recognize that Respondent, in denying Ford's request to stay in Baltimore, said that Baltimore was a nonunion shop. However, there is no allegation that Respondent ever withdrew recognition from Local 536 in Baltimore. In addition, even if this were the case, Respondent was not insisting that Ford remain in "non-union" Baltimore. Respondent was insisting that Ford go to Dulles, the Local 669 facility.

[1] All dates are in 1994 unless otherwise indicated.

The Company, a member of the union-employer National Fire Sprinkler Association, signed separate 1991-1994 NFSA union-shop agreements with Locals 536 and 669, recognizing them as representatives of its "journeymen sprinkler fitters and apprentices" in the Baltimore area and outside that area. Before the expiration of these agreements it withdrew its NFSA membership, joined the nonunion-employer American Fire Sprinkler Association (AFSA), and began separate bargaining with the Locals.

In the 1994 negotiations the Company proposed to each of the Locals the same six-part, partial-page agreement that would authorize it to operate nonunion, ensuring that the Locals would have no role in representing the employees. Although offered as a complete agreement, the proposal contained no recognition clause, no description of the bargaining units, and no contract term. It would nullify the separate bargaining units, which were based on the Locals' territorial jurisdictions.

The partial-page proposal would reduce the $ 21.45 and $ 22 journeyman sprinkler fitter rates to a sliding scale of $ 10 to $ 17 an hour and leave the classification of employees to the Company's sole discretion. It abolished the apprenticeship program as well as the apprentices classification and established a nonunit helper classification to be paid $ 6 to $ 10 an hour.

To replace the prior provision that "All tools will be furnished," the proposal provided that "No tools of any kind will be furnished to the employee." It eliminated the union health and pension benefits and offered the Company's optional medical plan in the unspecified future, with no immediate coverage. It abolished the jurisdictional limits for assigning employees. It abolished grievances and arbitration and

eliminated the provisions for union referrals, dues checkoffs, and union security. It also eliminated the overtime, show-up, lunchtime, holiday, and vacation provisions. It reserved an unrestricted right to subcontract work for economic reasons.

After the third bargaining session with each of the Locals, the Company declared an "impasse" because of their failure to agree to its proposed agreement. It then implemented the partial-page proposal as the "new contract," telling some of the employees that the Company was nonunion. It admittedly considered all the jobs vacated. It required each Local 536 member to report to the office, fill out an application for employment, discuss with it individually--without union participation--what his classification, wage rate, and the working conditions would be, and then agree to accept what it offered to continue working.

Anticipating strike action, the Company placed newspaper ads for experienced employees who "will work as permanent replacements and may be required to cross the picket line." Two weeks later, when neither union went on strike, the Company placed additional ads for experienced employees, but did not hire the Locals' members who applied.

By the time of trial 8 months later, the Company had hired a total of 47 new employees, but not a single member of Local 536 or Local 669. Despite its shortage of qualified fitters, it did not call the Locals for referrals as it previously had done. It required union members who did apply to submit an application, which it filed without hiring any of them. The only Local 536 member remaining on the payroll was an injured employee whom the Company had reinstated after NLRB charges were filed. With this one exception, the Company was

refusing to follow its prior practice of reinstating injured union members upon their recovery and return to work.

The Company avoided further negotiations, refusing to propose or agree to any meeting dates. Operating nonunion, it excluded both Locals from playing any role in representing the employees.

The primary issues are whether the Company, the Respondent, (a) as shown by its overall conduct--including the substance of its proposed partial-page agreement--bargained in bad faith, precluding valid impasse, (b) bypassed the Locals and dealt directly with bargaining unit employees, (c) unlawfully implemented unilateral changes in wages, benefits, and other working conditions and in the scope of the bargaining units, (d) unlawfully refused to hire and reinstate members of the Locals, (e) discharged and discriminated against union members to eliminate them from the payroll, and (f) engaged in other coercive conduct, violating Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Local 669, I make the following:

Findings of Fact

I. Jurisdiction

The Company, a corporation, fabricates, installs, alters, and services fire sprinkler systems with a facility in Owings Mills, Maryland, where it annually receives goods valued over $ 50,000 directly from outside the State. The Company admits

and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Locals 536 and 669 are labor organizations within the meaning of Section 2(5).

II. Alleged Unfair Labor Practices

A. Bargaining Units

The Company was a member of the union-employer National Fire Sprinkler Association when it signed the 1991-1994 NFSA collective-bargaining agreements (Tr. 94-95). In the agreements it recognized Local 536 as the bargaining representative of unit employees on jobs within the territorial jurisdiction of Baltimore and 10 miles beyond the city limits (G.C. Exh. 20 p. 5, art. 7; Tr. 27) and Local 669 on jobs in the United States outside "the present territory" covered by agreements of Local 536 and other locals (G.C. Exh. 59 p. 7, art. 6).

The appropriate bargaining units are:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 536, excluding office clerical employees, guards, and supervisors as defined in the Act.

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 669, excluding office clerical employees, guards, and supervisors as defined in the Act.

B. Bad-Faith Bargaining

1. Background

In the 1994 negotiations both Local 536 and Local 669 were fully aware that union fire sprinkler companies were facing stiff competition in the economic downturn that occurred during the term of their 1991-1994 NFSA agreements. To cooperate in making the companies more competitive, the Locals engaged in concessionary bargaining for new agreements with National Fire Sprinkler Association and the companies that were negotiating separately. (Tr. 202-204, 920-921, 963, 1105; R. Exh. 5 p. 1, par. 3 and p. 2, par. 2.)

Meanwhile, before the Company requested separate bargaining with each of the two Locals, the Company withdrew its NFSA membership and joined the nonunion-employer American Fire Sprinkler Association (AFSA) (Tr. 94-95, 800, 1458; G.C. Exhs. 6, 25, 26, 60). Based on its newsletters, AFSA was known to be "very antiunion" (Tr. 1052).

When Vice President Michael McCusker (the Company's principal negotiator) was asked at the trial, "What's the distinction between the AFSA and the NFSA?" he demonstrated his lack of candor when he answered: "None really that I know of. They're just two different--" It was only after further questioning that he admitted knowledge of the union/nonunion distinction. When asked if member employers of AFSA "by and large, are . . . parties to collective bargaining agreements with unions," he first falsely repeated his lack of knowledge, answering, "I don't know." He then admitted his knowledge, testifying: "I would probably say they're not." (Tr. 863-864.)

2. Bargaining strategy to operate nonunion

The Company's conduct in its separate 1994 negotiations with Locals 536 and 669 indicates that it was not bargaining in good faith and that its strategy was to provoke the Locals to

strike--enabling it to hire permanent nonunion replacements and operate nonunion.

Moreover, the substance of its first and final proposal for a six-part, partial-page agreement is evidence of bad-faith bargaining. If accepted, the proposed agreement would nullify the separate bargaining units and authorize the Company to operate nonunion, ensuring that the Locals would have no role in representing the employees.

McCusker admitted that the proposal to each of the Locals was the Company's "entire proposal" (Tr. 824) although it contained no recognition clause, no description of the separate bargaining units, and no contract term. He further admitted that the proposal was intended to constitute the Company's "complete, total agreement" and that the Company "did not want [any other item] as part of a bargaining contract" because the proposal "constituted everything that I needed" (Tr. 826). The Company took the position in its brief (at 15) that the proposal was offered and intended as the entire outline of a new contract.

I note that in McCusker's July 25 letter to Local 536 (G.C. Exh. 12) he enclosed "for your review, our [partial-page] proposal for a new agreement. If acceptable, please sign it and return it to our office [emphasis added]." Similarly in his July 14 letter to Local 669 (GC. Exh. 69) he stated that "We need to implement this [partial-page] agreement now." Also, as found below, after the Company declared an impasse in the negotiations, then implemented the proposal as the "new contract" and started operating nonunion, it avoided further negotiations with the Locals.

I discredit McCusker's claims elsewhere in his testimony that "not necessarily" was the proposal intended to be the "entire contract" between the Company and either Local 536 (Tr. 46-47) or Local 669 (Tr. 825). I also discredit President Allen Bolyard's claim that after the Company implemented the six-part proposal, it intended that the subjects not included in the proposal "would have to be discussed at a later date" (Tr. 806). By their demeanor on the stand, both Bolyard and McCusker appeared to be less that candid.

The Company's proposed agreement read as follows (G.C. Exhs. 12, 13, 54, 58):

I. WAGES

CLASSIFICATIONS	WAGE RATE
Lead Foreman	$ 24.00 - 22.00/hour
Foreman	$ 22.00 - 17.00/hour
Journeyman	$ 17.00 - 10.00/hour
Helper	$ 10.00 - 6.00/hour

American Automatic Sprinkler Systems, Inc. will determine the classification of employees, which will be subject to change solely at its discretion.

II. TOOLS

No tools of any kind will be furnished to the employees. Employees are required to bring their own tools and equipment. Employer reserves the right to furnish tools or equipment to employees at its discretion.

III. MEDICAL INSURANCE

Medical insurance will be offered in accordance with the company's existing plan: Blue Cross/Blue Shield of Maryland Preferred Provider.

IV. PENSION

A 401K plan exists for optional employee participation.

V. We will offer an apprenticeship training program similar to that which is currently provided by the AFSA.

VI. We reserve the right to subcontract work for economic reasons. This proposed "complete agreement" omitted and would nullify the Company's recognition of Local 536's Baltimore-area jurisdiction in defining the contractual bargaining unit and Local 669's jurisdiction outside that area in defining a separate bargaining unit.

The proposal would authorize the Company, at its sole discretion, to reduce the $ 21.45 and $ 22 journeyman sprinkler fitter rates to as low as $ 10 an hour. It abolished its 5-year NFSA apprenticeship program as well as the apprentices classification and its percentage scale (from 35% to 85% of the journeyman rate). It established a nonunit helper classification outside the contractual recognition clauses that covered only "journeymen" and "apprentices" in the expired agreements. It authorized the Company to change the classification of any employee--even a unit journeyman to a nonunit helper. (Tr. 862; G.C. Exhs. 20, 59.)

To replace the prior provision that "All tools will be furnished," the proposal provided that "No tools of any kind will be furnished to the employee. Employees are required to bring their own tools and equipment." It eliminated the union

health benefits and offered the Company's optional medical plan in the unspecified future, but no immediate coverage. It omitted the union pension benefits.

The partial-page proposal abolished the contractual territorial jurisdictions of the Locals for job assignments. The Company could assign employees to jobs located at unlimited distances from their homes, without travel expenses. Bolyard admitted that "under the proposed agreement, we don't have jurisdiction limits." (Tr. 109-111).

The proposal abolished grievances and arbitration and eliminated the provisions for union referrals, dues checkoffs, and union security. It eliminated the overtime, show-up, lunchtime, holiday, vacation, and other provisions. It reserved an unrestricted right to subcontract work for economic reasons.

3. Three bargaining sessions with Local 536

a. Delayed bargaining

The Company delayed negotiations with Local 536 until May 31, the expiration date of their 1991-1994 NFSA agreement. After Vice President McCusker sent his January 25 letter to Business Manager Robert Fique, advising that the Company would bargain independently, Fique requested McCusker to "notify me what time and dates would be convenient for you" to meet "to discuss alterations and amendments to our collective bargaining agreement" (Tr. 191, 1093; G.C. Exhs. 6, 7, 20).

McCusker did not respond. Fique attempted to contact him by telephone twice in February and once in March and finally reached him on May 3. Fique then asked him to read over their

expiring agreement, prepare desired amendments to help make the Company more competitive, and start bargaining. McCusker replied that he did not think that was necessary, "we should wait to see what happened" with Grinnell Corporation, the Company's largest competitor employing Local 536 members. Fique objected, stating "I don't think that's a good idea." (Tr. 190-192, 1053-1060, 1350; R. Exhs. 6, 7.)

On May 16 Fique sent McCusker a letter, stating in part (G.C. Exh. 10):

On February 4th at 1 p.m., February 10th at 3:30 p.m. and March 8th at 11 a.m., I attempted to reach you by telephone, to no avail.

During a more recent telephone conversation with Mr. McCusker I was advised to take a wait and see attitude to allow the Local #669 negotiations to give direction to our efforts. As you know, I disagreed with that suggestion and requested Mr. McCusker to review our current agreement and prepare proposals for possible amendments.

As you know, time is running out. Our agreement expires in 15 days and I am still trying to persuade you to begin the bargaining process. [Emphasis added.]

I discredit McCusker's claims that he did not recall any February and March messages from Fique and that it was Fique who said to take a wait-and-see attitude about the negotiations (Tr. 1326-1328; G.C. Exh. 45 pp. 3, 21; R. Exhs. 6, 7).

b. First meeting

McCusker and Fique finally met for negotiations on May 31, but did not discuss any of the specific provisions in the Local's

proposed agreement. McCusker had failed to review the Company's expiring NFSA agreement and to prepare desired amendments. When Fique handed McCusker the Local's proposal, McCusker merely placed it in a file, without any questions or discussion. (Tr. 198-199; G.C. Exh. 11.)

McCusker recalled that as he was sitting down for the meeting, Fique said, "By the way, I'll tell you right now, if you want to try going nonunion, just say so. I'll give you an impasse right now and we'll go our separate ways." McCusker denied any intention of going nonunion. Fique said, "I know you took a plane down [to Atlanta] to see [McNeill Stokes] in January and he's your lawyer [for the negotiations]." McCusker denied that Stokes was his lawyer, stating "He's the AFSA lawyer. I'm kind of being advised." (Tr. 1329-1332.) President Allen Bolyard testified that Stokes was the Company's counsel (Tr. 805, 1084-1085).

As a further explanation for Fique's "if you want to try going nonunion" comment, the Company introduced the Local's earlier October 1993 "Sprinkler Line" newsletter, Fique's "quarterly report from the business manager." It read in part (R. Exh. 5):

Employers Seeking Divorce

Three of our contractors have indicated that they may not become signatory to our next collective bargaining agreement. . . . I hope that we can continue our relationship but if not, it will be like any other divorce, we'll make sure that they walk away broke. Or, we can stay happily married, with minor squabbles.

When called as a defense witness Fique indicated (Tr. 1047) that he was referring in the 1993 newsletter to the Company, to another employer (possibly Reliance Fire Protection), and to "Automatic" Sprinkler. See the Board's recent decision in "Automatic" Sprinkler Corp., 319 N.L.R.B. No. 57 (Oct. 25, 1995) (employer withdrew from NFSA and unlawfully subcontracted all its work).

Fique was aware that the Company (as it and other union contractors in past years) had previously experienced a cash-flow problem and had been delinquent in its contributions to the NASI union health and pension benefit funds. The Company, however, had settled a NASI lawsuit against it and in March had made a lump sum payment of over $ 63,000 to the funds. It was currently making the contractual benefit contributions. (Tr. 1061, 1333-1334, 1427; G.C. Exhs. 6, 20, 45 p. 2, 59.) Contrary to McCusker's claim at the trial that he complained to Fique at the first meeting that the Company was "bleeding [financially] from all sides" (Tr. 1333), Fique credibly testified that he did not recall McCusker's stating anything in the meeting about the Company's financial condition (Tr. 1060).

c. Second meeting

Again in the second meeting on June 8, McCusker did not discuss with Fique the proposed terms of a new contract. The meeting was held with representatives of the Company's two largest competitors employing Local 536 members. They were Chet Tucker, the regional director of Grinnell Corporation, and Charles Cangemi, the president of Reliance Fire Protection. (Tr. 200-201, 1072, 1092-1093.)

Fique was engaging in concessionary bargaining with Tucker and Cangemi. McCusker did not participate in the discussion until the end of the 3- or 4-hour meeting when Cangemi said, "Mike, we haven't heard from you during the whole meeting. Do you have anything to say?" McCusker then complained about general contractors beating down bid prices, problems in collecting money from customers, and general industry problems. (Tr. 201, 1097.)

According to McCusker, Tucker "had a lot of experience" and Cangemi "knew what he was doing from generations" in the business, but "I had never been in negotiations before" and "I was way under qualified. . . . I would have been an impediment. Anything I said to what was going on would have been a detriment to those guys . . . I had nothing to contribute except whining, bitching." McCusker recalled that Cangemi said, "Yeah, he's just sitting back there learning. We'll take care of it, Mike. We'll settle it." (Tr. 1339, 1341-1342, 1359.)

d. The Company's nonunion proposal

On July 25, the week before Fique reached agreement on new contracts with Grinnell and Reliance, McCusker sent a letter to Fique, enclosing the Company's only proposal, the partial-page agreement. As discussed above, the proposed agreement would authorize the Company to operate nonunion and to subcontract all its work--as the Company's competitor, "Automatic" Sprinkler, was then doing. "Automatic" Sprinkler Corp., above.

The letter, implying that the Company was not aware of the status of the Local's negotiations with the Grinnell, read (G.C. Exh. 12):

It was clear as a result of our last round of negotiations [on June 8], that you were moments away from reaching an agreement with the dominant area company [Grinnell]. We agreed at that time to wait until said agreement was made, as it would then be a possibility of our company agreeing to an identical agreement.

That was nearly two months ago. We can no longer assume that you are near an agreement with anyone. We need to meet and reach an agreement on our own. This should be done as quickly as possible, as we are as yet unable to properly bid our work. Please check your schedule and contact our office with a time and date that you can meet with us. We are available to meet any time [on] any date. We have enclosed for your review, our [partial-page] proposal for a new agreement. If acceptable, please sign it and return it to our office. We look forward to meeting with you within the next few days. [Emphasis added.]

e. Third meeting

Before Fique's third meeting with McCusker on August 4, the Local 536 membership voted to reject the Company's July 25 proposed partial-page agreement, but to ratify the new collective-bargaining agreements with Grinnell and Reliance, the Company's largest competitors employing Local 536 members. The Local had agreed in those contracts to lower wages and other economic concessions. (Tr. 202-206, 1105.)

As Fique credibly testified, throughout the bargaining process "I was led to believe (by McCusker] that once we reached agreement with Grinnell that [the Company] was just going to sign that agreement" (Tr. 1068). "Grinnell consistently employs

the majority of our members, probably twice as many as [the Company]" (Tr. 1093).

As quoted above, McCusker appears to have acknowledged this understanding when he wrote in his July 25 letter (G.C. Exh. 12) that "We agreed [at the June 8 meeting with representatives of Grinnell and Reliance] to wait until [the Grinnell agreement with Local 536] was made, as it would then be a possibility of our company agreeing to an identical agreement." Neither in that letter, nor in any other correspondence with Fique, did McCusker claim that the Company was for some reason financially unable to pay the union wages and benefits that Grinnell and Reliance would be paying members of Local 536.

In the August 4 meeting Fique informed McCusker that the membership had rejected the Company' proposal by a vote of 60-to-0, but had ratified the Grinnell and Reliance agreements. Fique handed McCusker a summary of the Grinnell agreement and, "because I was led to believe that [McCusker] was going to sign that document," stated that they should discuss it. McCusker "said he wanted to talk about his proposal. He didn't want to talk about those agreements." (Tr. 206, 1067, 1072, 1106-1107, 1345; G.C. Exh. 16.)

McCusker and Fique then discussed part 2 of the Company's proposal that "No tools of any kind will be furnished to the employee." As Fique credibly testified, contrary to McCusker's claims (Tr. 206-207, 1105-1106, 1346):

He told me he was talking about all tools. And I told him some of the tools of our trade are very expensive. Some of them cost thousands of dollars. Is he talking about those tools? And he said, "Yes."

[I] said what happens if a member is on the job and the toolbox is broken into and somebody steals a power machine? Would the member be required to buy a new power machine? Mike [McCusker] said, "Yes". . . . I let Mike know . . . it was ridiculous. It might be an asshole proposal. I used as an example that. . . . If somebody broke into the office and stole the secretary's computer, would Judy be required to replace the computer at her cost? And he said, "Absolutely."

I infer that McCusker's placing this so-called "ridiculous" interpretation on part 2 of his proposed partial-page agreement (contrary to his interpretation of the same provision earlier on July 14 in his negotiations with Local 669, discussed below) was intended to frustrate the negotiation of any agreement with Local 536.

Earlier in the meeting McCusker "tossed" a copy of the Company's Blue Cross/Blue Shield Medical Plan (a booklet about an inch or so thick) on the table and said. "This is our medical plan" and (contrary to McCusker's denial, Tr. 69), "You accept that medical plan, or we're at impasse." Fique responded that "We're not at impasse" and that he would look at the medical plan and get back to McCusker on it. (Tr. 208, 1070-1071.)

The entire meeting lasted no longer than 30 minutes. The Company still refused to discuss any of the Union's proposal or the concessions (including some of McCusker's ideas) that Local 536 had made in the new Grinnell agreement. McCusker had not referred to his proposed partial-page agreement as his final offer. (Tr. 208-210, 1072, 1106.)

Fique, who impressed me most favorably as a truthful, forthright witness, credibly testified upon questioning by the Company's trial counsel (Tr. 1104-1105):

Q. [BY MR. DUBE] Did Mr. McCusker during your negotiating sessions with him or phone conversations. . . tell you that he thought his proposal was important, or urgent, or necessary for his company financially?

A. I didn't get his proposal until the end of July and we only had one meeting after that and, no, we didn't discuss company finances [emphasis added].

Q. Before . . . you got the July 25 letter with the specific proposal, had he told you in words or in substance that it was vital or important for his company to obtain changes from the existing contract?

A. I don't think so, but he didn't have to tell me that. I think I knew that with all the companies. That's why I cut $ 5.00 an hour.

Q. I'm sorry, that's why?

A. That's why I rewrote the collective bargaining agreement and made so many concessions. This has been a real tough industry for the last three years.

After the August 4 meeting Fique referred the Company's medical plan to a consultant. On August 9 he notified secretary-receptionist Kimberly Goldbeck to give McCusker the message that "I am pretty sure we can work the medical plan into our agreement." (Tr. 209, 1075, 1104; R. Exhs. 6, 8.). The next morning, however, before he and McCusker could

meet again, Fique received McCusker's August 9 letter declaring an impasse and advising that the Company was implementing its partial-page proposal on August 11.

4. Three bargaining sessions with Local 669

a. First meeting

Before their first meeting on May 20, the Company had on March 22--9 days before the March 31 expiration of their 1991-1994 NFSA agreement--mailed Local 669 the proposed partial-page agreement which, as discussed above, would authorize the Company to operate nonunion and to subcontract all its work. Business Agent John Garthe replied on March 29 that "Local 669 does not agree to your contract proposal." (G.C. Exhs. 54, 62.)

President Bolyard joined McCusker in the May 20 meeting. This was the only meeting in which Bolyard was present with McCusker, who had no prior experience in collective bargaining. Garthe and Vice President John Bodine represented Local 669. They discussed the Company's March 22 proposal (which Bolyard testified he, McCusker, and Counsel McNeill Stokes had prepared), Local 669's counterproposal, and comparable rates of plumbers, gas fitters, and steam fitters in the Baltimore area. As requested, Garthe showed the Company a copy of the "economic highlights" of Local 669's newly negotiated nationwide NFSA agreement. He emphasized that it was not Local 669's proposal. (Tr. 99, 826-828, 916-921, 1358-1361; G.C. Exhs. 66-68.)

As Garthe credibly testified, "the whole thing around the negotiations was that Local 669 was looking to make our contractors in the area competitive" and "there was movement

[on] the wage proposals and apprenticeship ratio [to journeymen on the job]" (Tr. 920-921). He later explained (Tr. 963):

Basically we all agreed that we had to make our contractors more competitive and that Local 669 was in the business of making our contractors competitive because we wanted them to stay in business and we wanted them to employ our people.

b. Second meeting

Before McCusker's second meeting with Garthe and Bodine on July 14, McCusker sent Garthe a letter on June 23, stating in part (G.C. Exh. 69):

We need to finalize our agreement. We need to meet and negotiate the changes within our [March 22 partial-page] proposal. We need to know which item you are willing to discuss or are in agreement with. We are available any day. We need to implement this [partial-page] agreement now. [Emphasis added.]

In the July 14 meeting they discussed only the proposed partial-page agreement. McCusker stated that tools the men would be required to supply under part 2 of the proposal did not include scissor lifts and power machines. When Garthe presented a counterproposal, McCusker said it was too much for him to go through, that he did not want to discuss anything in it, and that he would take it home, review it, and come back with recommendations of what he thought was useful and not useful. Then "we could have a meaningful negotiation session at our next meeting." (Tr. 924-925, 979, 1362-1366; G.C. Exh. 71.)

c. First claimed impasse

Despite McCusker's promise at the July 14 meeting to review Local 669's proposal for "meaningful negotiation" at the next meeting, McCusker sent Garthe a letter on July 22, referring to McCusker's March 22 proposal as our "last and final" offer. The letter stated in part (G.C. Exh. 72):

It is now almost four months since the expiration of the collective bargaining agreement, and we are getting nowhere in our negotiations. We are polls apart on the economic issues of our proposal that we need to be competitive. Local 669's position has been, and continues to be, that you will not consider our fringe benefit proposal but insist upon your fringe benefits, and you have not agreed to negotiate on our wage proposals. We are certainly at impasse on these economic issues.

You just gave us a forty-three page proposal with provisions that are totally unacceptable in light of the competitive situation. Accordingly, we intend to implement our last and final offer which is attached on August 1, 1994. In the meantime, we will be glad to meet with you concerning the economic issues. I am available any day next week. [Emphasis added.]

The Local responded on July 27, denying McCusker's "version of the relevant facts." The letter stated (G.C. Exh. 73): "As you are well aware, the parties have not reached an impasse. We feel that we have, indeed, made progress in negotiations and we still have room for movement. . . . We are available to meet with your organization on August 11, 1994." Upon receipt of this faxed letter McCusker replied on July 27 (G.C. Exh. 74): "We must meet before August 1, 1994. We

need to know, in writing, which of the economic parts of our proposal you agree with. Until now, you have been unwilling to agree to any of them."

Because of conflicting schedules the Company and Local 669 agreed to meet on August 8 (G.C. Exhs. 75, 76, 78). Garthe stated in his July 28 letter (G.C. Exh. 75) that "As we have stated before, the parties are without question, not at impasse. Further, we will communicate our position relative to your proposals at the bargaining table." McCusker responded in his August 3 letter (Tr. 78) that "We will finalize our negotiations, 'at the bargaining table' on August 8, 1994."

d. Third meeting

In the August 8 meeting McCusker stated he had not had time to review the Local's July 14 proposal, that he did not want to discuss it, and that he wanted to discuss only the six parts of his proposal. McCusker admitted at the trial that when Garthe said, "Let's go through" the Local's proposal, I said "No, no, I'm not going through that. I don't have the time to sit here and go through that miserable stack of paper. . . . You're wasting my time." Finally, however, McCusker reluctantly agreed to go through the Local's proposal. (Tr. 934-935, 1368-1369.)

In the discussion that followed, McCusker stated that the Company had lost money for the last 3 years and Garthe lowered his wage proposal to about $ 22 for foreman, $ 20 for journeyman, and $ 6.60 to $ 7.70 for trainee. Garthe wrote in his notes of the meeting that the Company "needs the proposed wage rates to compete because they have lost money the last three years. Is a fact that they have lost money." (Tr. 813, 950-951, 954-955, 961-963, 985-986, 1381-1392; R. Exhs. 3, 4, 13, 14.)

Garthe credibly testified that when he lowered his wage proposal, McCusker said he agreed with those wages. But when Garthe said, "now that we have the wages settled," McCusker said, "Oh, no, I didn't agree to that." (Tr. 937, 950-951, 968.) McCusker claimed at the trial that he did not know why he agreed to the lowered wages. He testified (Tr. 1376):

It's accurate that that's what happened in the meeting. And I to this minute don't understand why that happened, and I do recall it like it was yesterday.

John [Garthe] said something like, so these wages are okay with you? Something like that. And I said, yeah. So we agree on that? Yes. Move on. When we got to another place . . . he said, wait a minute, you just agreed on those wages. I said, I did not. . . . I don't agree. I agree with my proposal, and I think we should put it in play, but I don't agree with anything else. [Emphasis added.]

I infer that after McCusker agreed to the lowered wages that Garthe was offering, he realized that doing so conflicted with the Company's plans to implement its partial-page proposal, without change. He then falsely denied agreeing to the lowered wages and stated that "I agree with my proposal . . . I don't agree with anything else." (President Bolyard testified that the Company did not "ever take any position which differed" from the March 22 proposal, which he, McCusker, and McNeill Stokes prepared, Tr. 100, 805-806.)

McCusker further admitted that as they then went from one provision in the Local's proposal to the next, "I wasn't paying much attention" (Tr. 1371).

When Garthe informed McCusker that he had seen the Company's medical plan for the first time that morning and that he wanted someone knowledgeable to look over it, McCusker said that would be fine with him, he would welcome someone else looking at it. McCusker admitted that after the review of the medical plan, "they were going to get back to [me] with what they thought about it." (Tr. 831-832, 931, 939-940; G.C. Exh. 77.)

The negotiators, however, had no opportunity to discuss the medical plan and seek agreement on it and other issues, because the next day (Tuesday, August 9), as discussed below, McCusker sent the Local a letter again declaring an impasse and stating that the Company was implementing its March 22 proposal on Thursday, August 11.

5. Declaring impasse and operating nonunion

Evidence of the Company's conduct away from the bargaining table supports a finding that the Company had not been bargaining in a good-faith effort to reach agreements with the Locals, but was determined to operate nonunion. Even though neither Local went on the strike that it expected, the Company began operating nonunion and excluded the Locals from any role in representing the employees.

On August 9 Vice President McCusker sent Locals 536 and 669 "impasse" letters, attaching a copy of the Company's proposed partial-page agreement. The "impasse" letter to Local 536 referred for the first time to the proposal as "our final offer" or "final proposal." It read (Tr. 210; G.C. Exh. 13):

In light of the fact that Local 536 has rejected our final offer and the membership has turned down our final offer 60 to 0, we

are at impasse. Accordingly [the Company] will implement the terms and conditions of its final proposal, a copy of which is attached, on Thursday, August 11, 1994. [Emphasis added.]

The "impasse" letter to Local 669 read (G.C. Exhs. 58, 81):

You have failed to accept our final offer. You have had this offer since March 23, 1994. You have rejected this offer four times [once by mail and three times in meetings] during the past 140 days. We are at impasse. Accordingly [the Company] will implement the terms and conditions of its final proposal, a copy of which is attached, on August 11, 1994.

McCusker admitted that he sent the August 9 letters for next-day delivery "to make sure they got it" on the morning of August 10 "so that way they could call their membership and tell them what was going on" (Tr. 1354-1355). Although not admitted, I infer that the Company sent the "impasse" letters for early delivery on August 10, expecting strikes to be called, enabling it to employ permanent nonunion replacements.

The ads that the Company placed for experienced employees in the Sunday, August 14 editions of the Baltimore Sun, Washington Post, and Carroll County Times clearly confirm the expectation of strikes. The Company had never placed an ad for new employees before (Tr. 807). The ads read (G.C. Exhs. 21, 53):

SPRINKLERS/CONSTRUCTION. American Automatic Sprinkler Systems, Inc. is seeking to hire individuals with experience in commercial construction. The work involves the installation of sprinkler systems. Interested individuals should contact the Personnel Dept. at 410-363-3995.

Please note that there may be a labor dispute in progress and persons hired will work as permanent replacements and may be required to cross the picket line. [Emphasis added.]

That week President Bolyard personally revealed to a Local 669 member that the Company was planning to operate nonunion. Journeyman Clarence Sampson credibly testified that when he went to the shop to pick up an air compressor, Bolyard came out and said, "I'd like to speak to you in my office." Later in the office Bolyard told him (Tr. 1006-1007):

We are sending [the Local] the letter that's saying that we are at an impasse. It will be delivered probably by midnight tomorrow night. . . . At that time we will no longer be a member of this Local. . . . It is like a 20-year marriage, I have been with the Local. The marriage is over. [Emphasis added.]

On August 11, as discussed below, the Company implemented the partial-page proposal as the "new contract." Bolyard and Superintendent Duane Forsythe delivered the August 9 "impasse" letter (with the proposal attached) to employees at the Local 536 jobsites and Chief Engineer Scott Barnhart contacted the Local 669 members. The three spokesmen told some of the employees that the Company was nonunion. Bolyard admitted (Tr. 70, 817) that the Company required the employees "to come in and fill out new applications."

The Company considered all of the bargaining unit jobs to be vacated. Bolyard admitted stating in his pretrial affidavit that "Technically we have implemented new terms. We did not have any employees." (Tr. 817-818.) He and Forsythe, as discussed below, required that if the Local 536 members wanted to continue working, they must go to the office, submit

an application for employment, discuss individually their classification, wage rate, and working conditions with Forsythe--without any union participation--and agree to accept what the Company offered. The Company had ceased its practice of calling the Locals for referrals of employees. It was not calling them, despite (a) the absence of a strike, (b) the Company's shortage of qualified fitters, as discussed below, and (c) the poor response of nonmembers of the Locals to the August 14 newspaper ads and the ads it placed for experienced employees 2 weeks later on August 28 (G.C. Exh. 22). McCusker admitted that (nonmembers') response to the newspaper ads was "predominantly from helpers without many skills" (Tr. 1451).

Instead of calling the Locals as before, McCusker wrote both Locals on August 18 that "All personnel interested in employment under the terms of our final offer, are requested to apply for work at our office. Applicants who are members of [Local Union 536 or Local Union 669] can apply between 9:00 a.m. and 4:00 p.m." (G.C. Exhs. 14, 56). When members of the Locals did apply, as discussed below, the Company filed their applications without hiring any of them. Bolyard admitted that before August 11, they "Usually just called the business agents" for new employees (Tr. 806).

The Company was operating nonunion, excluding both Locals from playing any role in representing the employees.

6. Avoiding further bargaining

In reply to McCusker's August 9 "impasse" letter, Local 669 wrote him on August 19 (G.C. Exh. 82), denying an impasse and requesting: "Please contact us to arrange a mutually acceptable date to resume negotiations between the parties"

(emphasis added). Fique wrote him on August 30 for Local 536 (G.C. Exh. 15), stating that "I have evaluated your company medical program" and that he was seeking continued bargaining: "Please submit a list of times and dates that will be convenient to you" (emphasis added).

The Company gave its only response on September 6. This was nearly a month after it began operating nonunion under its "new contract" (the implemented partial-page proposal), which nullified the separate bargaining units based on the territorial jurisdictions of the Locals.

During that time the Company had excluded the Locals from its individual discussions with their members about continued employment and it was not calling the union business agents for referrals. Admittedly recognizing no "jurisdiction limits" in assigning employees, the Company had already assigned a Local 536 member to work in Virginia (Local 669's jurisdiction) and had told a Local 669 member that if he wanted to work, to go to work in Baltimore (Local 536's jurisdiction). (Tr. 109, 334-335, 877-878.) On September 6 it required all field employees "to have their own means of transportation to the various jobsites around Maryland, D.C. and Virginia [emphasis added]," disregarding the previously recognized territorial jurisdictions of the Locals in what were separate bargaining units (G.C. Exh. 39).

The Company had twice placed newspaper ads for experienced employees and it was hiring nonmembers of Locals 536 and 669, but was refusing to hire any of the union members who applied. By September 6 (beginning on August 16) it had hired 16 nonmembers, including five nonunit helpers to do bargaining unit work, as discussed below. (Tr. 449-450, 771, 972-973, 1248-1249; G.C. Exh. 30; R. Exh. 11).

On that September 6 the Company also summarily discharged three Local 536 members at the FANX jobsite, without prior warning, purportedly for lack of productivity. One of them, journeyman Stephen Paca, telephoned McCusker afterward and asked if he was fired because he was a union member. McCusker answered no, that they "were still a union contractor" (contrary to the statements by Bolyard, Forsythe, and Barnhart to some of the employees that the Company was then nonunion, as discussed below). Paca asked how could the Company then "have people on the job that weren't members of the Local." As Paca credibly testified, "I don't believe he responded to that." (Tr. 439, 446-447.)

McCusker's September 6 response to the Locals' August 19 and 30 bargaining requests was his identical letters to the two Locals. In the letters he ignored the requests to "contact us to arrange" meeting dates and "submit a list of times and dates" to continue negotiations. Although he expressed a willingness to negotiate, the letters reveal that the Company had no intention of negotiating in good faith with the Locals as representatives of employees in the separate bargaining units based on the Locals' territorial jurisdictions. The letters refer only to discussing the terms and conditions "within our final proposal," which omits and nullifies the separate bargaining units and authorizes the Company to operate nonunion.

McCusker's September 6 letters state (G.C. Exhs. 18, 83):

We are prepared (and have always been prepared) to meet with you to negotiate. Please be prepared to discuss the terms and conditions within our final proposal [emphasis added]. Please feel free to contact our office and schedule a meeting at your convenience.

If you have any questions, please do not hesitate to contact our office.

In Fique's September 12 reply letter he reviewed his continuing unsuccessful efforts to resume the negotiations. These efforts included four times on September 9, the day after he received McCusker's September 6 letter. Having received no response from McCusker, Fique was proposing in writing a choice of seven nearby dates for the next meeting (G.C. Exh. 19):

On September 8, 1994 I was surprised to receive a letter from you requesting continuation of the collective bargaining process.

As I indicated to you during our meeting August 4th, 1994--my telephone message to Kim [Goldbeck] August 9, 1994--my letter to you August 30, 1994--three telephone calls to your office September 9, 1994 and my fax to you also on September 9, 1994--[Local 536] remains ready to continue negotiations. [Emphasis added]

I am available: [listing seven dates from September 14 to September 26].

Looking forward to continuing our long, harmonious relationship, I remain, Cordially yours.

McCusker never responded (Tr. 215). Despite his stated willingness to meet, he avoided further negotiations, refusing to propose or agree to any meeting dates. The Company continued to operate nonunion, excluding both Locals from playing any role in representing the employees.

7. Contentions of the parties

The General Counsel contends in its brief (at 1, 76, 94) that the evidence shows that the Company bargained "dilatorily and in bad faith" and entered into negotiations with both Local 536 and Local 669 with no intention of reaching an agreement. Referring (at 98) to the Company's partial-page proposal, he cites *Palace Performing Arts Center*, 312 N.L.R.B. 950, 958-959 (1993), *enf'd. mem.* 149 L.R.R.M. 3120 (2d Cir. 1994), in which the Board held:

> We agree with the judge's conclusion that the [employer] engaged in overall bad-faith bargaining. . . . We agree that the substance of the [employer's] proposals is a factor supporting a finding of overall bad-faith bargaining under *Reichhold Chemicals*, 288 N.L.R.B. 69 (1988). These proposals were not merely "unacceptable" to the Union, as the judge noted. Considered in the context of the other conduct discussed above, the [employer's] proposal objectively indicated the [employer's] intent to frustrate negotiations by proposing an extreme limitation on the expired contract's scope by "gutting" the [20-page] contract and converting it to a half-page document containing three flat rates. [Emphasis added.]

Local 669 contends in its brief (at 26-27) that the Company's "bad faith is clearly reflected in the contents of its proposals, among other things" and that "In addition to its bad faith at the bargaining table, [the Company] also engaged in substantial independent violations of the Act, which shed light on the Company's overall illegal objectives." After citing Palace Performing Arts, it also cites *Bethea Baptist Home*, 310 N.L.R.B. 156, 157 (1993), in which the Board held (footnotes omitted):

We believe that the [employer's] conduct manifests a mindset at odds with reaching an agreement with the Union.

Finally, we note that the [employer] insisted on proposals which would leave the [union] with fewer rights than imposed by law without a contract, made no significant concessions, and advanced proposals which would cut back on existing terms and conditions. At the same time, the [employer] sought through its proposals to ensure that the [union] would have no role in the representation of bargaining unit employees by taking an intransigent position against including arbitration, visitation, dues checkoff, union security, or any provision for union postings at the facility. While the [employer] was not compelled to agree to any particular proposals by the [union], we find that, viewed in their totality, the [employer's] substantive proposals constituted additional evidence of the [employer's] bad faith. [Emphasis added.]

The Company in its brief (at 2, 12-13) "submits that there is no meaningful evidence of dilatory or evasive bargaining." It argues that "the record in this case reflects a series of misconceptions about [the] 1994 negotiations [between the Company and the two Locals], with an ensuing series of assumptions or suspicions about actions taken by [the Company]."

Ignoring the particulars of its partial-page proposal to both Locals and its conduct both at and away from the bargaining table, the Company contends (at 2, 9, 14) that "the fundamental allegation in these cases, bad-faith bargaining, is unsupported by the evidence." It argues that the negotiations "may reflect difficult or 'hard' bargaining between parties, but not an unlawful refusal to bargain," that the Locals were "not willing

to accept the substantial concessions demanded by [the Company], and that a deadlock was therefore the result."

8. Concluding findings

I find that in the Company's 1994 separate negotiations with Locals 536 and 669, its conduct both in the bargaining sessions and away from the bargaining table, in combination with the substance of its first and final partial-page proposal, shows that the Company was negotiating in bad faith with no intention of even seeking an agreement with either Local.

As found, after the Company withdrew from the union-employer NFSA and joined the nonunion-employer AFSA, it met in three bargaining sessions with each of the Locals, then declared an impasse. It had proposed to each of them the same partial-page proposal.

The proposal would authorize the Company to operate nonunion, ensuring that the Locals would have no role in representing the employees. Although offered as a complete agreement, the proposal contained no recognition clause, no description of the bargaining units, and no contract term. It would nullify the separate bargaining units, which were based on the territorial jurisdictions of the two Locals.

The Company delayed bargaining with Local 536 until May 31, the expiration date of their 1991 NFSA agreement. In this first bargaining session and in the second meeting on June 8 with representatives of Grinnell and Reliance, Vice President McCusker deceived Business Manager Fique into believing that once Fique reached agreement with Grinnell (the Company's largest competitor employing Local 536 members), the Company "was just going to sign that agreement."

On July 25, the week before Fique reached agreement on new contracts with Grinnell and Reliance, McCusker mailed the partial-page proposal "for a new agreement," requesting that "If acceptable, please sign it and return it to our office."

At the third meeting on August 4, after the Local's membership rejected the Company's proposed partial-page agreement by a vote of 60-to-0 but ratified the new Grinnell and Reliance agreements, McCusker refused to even discuss the Local's concessions in the new Grinnell agreement. Then when discussing the Company's proposal, McCusker placed what Fique called a "ridiculous" interpretation on the provision that "Employees would be required to bring their own tools and equipment." McCusker stated that this included such expensive tools as a power machine, evidently to frustrate the negotiation of any agreement with the Local. McCusker continued his refusal to discuss the Local's proposal.

In the first Local 669 bargaining session on May 20, the Company and the Local discussed both the Company's proposed partial-page agreement and the Local's proposal. Before the second meeting on July 14, McCusker wrote the Local on June 23 that "We need to meet and negotiate the changes within our proposal" and "We need to implement this [partial-page] agreement now." In the July 14 meeting they discussed only the Company's proposed partial-page agreement. McCusker refused to discuss the Local's counterproposal, but promised that he would take it home, review it, and come back with his recommendations for "a meaningful negotiation session at our next meeting."

Reneging on this promise, McCusker wrote the Local on July 22, declaring an impasse on the economic issues and announcing that "we intend to implement our last and final

[partial-page] offer which is attached on August 1, 1994." Then when the third meeting was held on August 8, McCusker stated he had not had time to review the Local's July 14 proposal and that "I don't have time to sit here and go through that miserable stack of paper. . . . You're wasting my time."

McCusker finally agreed to go through the Local's proposal. He then stated that the Company had lost money for the last 3 years, the Local lowered its wage proposal, and McCusker admittedly agreed to the lowered wages. When, however, the Local later told him "you just agreed on those wages," McCusker falsely denied doing so and admittedly said "I agree with my proposal. . . . I don't agree with anything else." McCusker further admitted that as they then went from one provision in the Local's proposal to the next, "I wasn't paying much attention." He obviously was not bargaining in good faith.

On August 9, following his third meetings with Locals 536 and 669 on August 4 and 8, McCusker declared an impasse in the negotiations with the Locals, sending each Local an "impasse" letter, attaching a copy of the Company's proposed partial-page agreement.

Evidence of the Company's conduct away from the bargaining table supports a finding that the Company had not been bargaining in a good-faith effort to reach agreements with the Locals, but was determined to operate nonunion. Even though neither Local went on the strike that it expected, the Company began operating nonunion.

On August 11 the Company implemented the proposed partial-page agreement as the "new contract." It disregarded the Locals' territorial jurisdictions in assigning their members. It

ceased calling the Locals for the referral of employees and told some of the employees it was nonunion. It twice placed newspaper ads for experienced employees and hired nonunion employees, including nonunit helpers to perform bargaining unit work, but refused to hire any of the Locals' members. Meanwhile, as found below, it was dealing directly with the employees. It avoided further negotiations with the Locals and excluded both Locals from playing any role in representing the employees.

As in *Palace Performing Arts*, 312 N.L.R.B. 950, above, the substance of the Company's implemented partial-page proposal is "a factor supporting a finding of overall bad-faith bargaining under *Reichhold Chemicals*, 288 N.L.R.B. 69 (1988)." The proposal was not merely "unacceptable" to the Locals, but "considered in the context of the other conduct," it "objectively indicated [the Company's] intent to frustrate negotiations by proposing an extreme limitation on the expired" agreements' scope by "gutting" and "converting" them to a partial-page document.

As in *Bethea Baptist Home*, 310 N.L.R.B. at 157, above, the Company sought through its proposed partial-page agreement "to ensure that the [Locals] would have no role in the representation of bargaining unit employees." The proposal left employee classifications and wage rates to the Company's sole discretion.

It omitted any role of the Locals in determining what tools and equipment the employees would be required to buy and when medical insurance would be offered and at what cost to the employees. It abolished grievances and arbitration and eliminated union referrals of employees, dues checkoffs, and union security.

The Company's "new contract," as in that case, "cut back on existing conditions," but without the Company's making any concessions. It authorized the Company to reduce the $ 21.45 and $ 22 journeyman sprinkler fitter rates to as low as $ 10 an hour. It abolished its NFSA apprenticeship program and the apprentices classification and its percentage scale (from 35% to 85% of the journeyman rate) and added a nonunit $ 6 to $ 10 helper classification.

The "new contract" eliminated the union pension benefits and provided the employees no immediate health insurance. It nullified the separate bargaining units that were based on the territorial jurisdictions of the Locals. It made other unilateral changes (listed in more detail below), including the elimination of Local 669's jobsite inspection privileges and employee travel expenses (G.C. Exh. 59 p. 11, arts. 10, 11). By reserving the unrestricted right "to subcontract work for economic reasons" without notice to the Locals or bargaining, it deprived the Locals of a bargaining right imposed by law without a contract.

As in *Bethea Baptist Home*, the Company's conduct "manifests a mindset at odds with reaching an agreement" with the Locals. Although it "was not compelled to agree to any particular proposals," I find that, "viewed in their totality," the Company's "substantive [partial-page] proposals constituted additional evidence of the [Company's] bad faith."

I therefore find that the Company, as shown by its overall conduct--including the substance of its first and final proposed partial-page agreement--bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act and precluded valid impasse in the negotiations with Locals 536 and 669.

Unquestionably, there exists a Section 9(a) relationship between both Locals 536 and 669 and the Company (Tr. 187-188, 801-803; G.C. Exh. 20 p. 7, art. 3; G.C. Exhs. 51, 52, 59 p. 4, art. 3). *Decorative Floors Inc.*, 315 N.L.R.B. 188, 189 (1994); *Triple A Fire Protection*, 312 N.L.R.B. 1088, 1089 (1993).

C. Direct Dealing with Employees

On August 11 President Bolyard and Superintendent Forsythe went to the Local 536 jobsites to distribute copies of the Company's "impasse" letter, with the partial-page proposal attached. Regarding the proposal, Forsythe testified that either Bolyard or McCusker told him that it was the "contract" that they were going to implement (Tr. 1290). Meanwhile, Chief Engineer Scott Barnhart contacted the Local 669 members.

Bolyard admitted that the employees were required "to come in [from the field to the office] and fill out new applications." He explained, "Technically we have implemented new terms. We did not have any employees." (Tr. 817-818.) Vice President McCusker testified that the employees were supposed to meet Forsythe (on August 12) for him to explain what their new wage rates and benefits were (Tr. 850).

At the Shot Tower jobsite on August 11, when Bolyard talked to the employees and handed journeyman Joseph Brown the letter and proposal, Brown asked, "You mean to tell me [that with my journeyman experience and schooling] you would offer me a $ 10 an hour labor job?" In response, regarding Brown's wage rate under the $ 10 to $ 17 sliding journeyman scale, Bolyard replied, "That's not in cement. . . . It's negotiable [emphasis added]." (Tr. 221, 226.) As apprentice Todd Hood also credibly recalled, when Brown asked if Bolyard would pay

a mechanic $ 10 an hour, Bolyard said that it was "negotiable" (Tr. 234, 241-242).

Similarly at the FANX jobsite on August 11, after Forsythe told the employees the Company was "implementing the terms of the contract that they'd offered the Union," journeyman James Birmingham said "There was no way I was going to work for $ 10 an hour. He might as well call Allen Bolyard up and get my paycheck out to me." As Birmingham credibly testified, Forsythe responded that "he didn't believe everybody would be making $ 10 an hour" and that they had to "make appointments to come in and negotiate" their wage rate (emphasis added). He said that "everything would have to be dealt [with] through" the office, explaining that "they were nonunion [emphasis added]" and "if we wanted to come along with them, we could go." (Tr. 359-361, 392, 394.)

When Forsythe left the room the employees discussed what to do. Expressing the employees' quandary, journeyman Howard Crosby testified: "We don't negotiate our wages . . . that was something new to us." (Tr. 332-333, 361.)

Later that day, Forsythe went to the Winchester Homes jobsite and told foreman Warren Bentert and apprentice Stefan Buitron that the partial-page proposal "was a new contract" they were working under and "we wouldn't be working under the [Local 536] contract anymore." (Emphasis added, Tr. 643, 739).

About 8 o'clock the next morning (Friday, August 12) when Birmingham arrived at the office ("a good 45-minute ride" from the FANX jobsite), he asked Bolyard "what our pay rate was going to be for the day before, beings that they sent the letter out in the middle of the day." Bolyard answered that he

would pay them $ 21.45 an hour for that day, but "our rates would be cut" that Friday and "all the negotiations [emphasis added] after that would go through" Forsythe. (Tr. 362-364.)

Barnhart (who did not testify), was "the manager of the day work" (the small contracts, tenant work). He delivered the Company's message to the Local 669 members. When giving journeyman Ronald Moyers an assignment for the next day, he told Moyers "he wasn't honoring [the Local 669] contract anymore [emphasis added]. . . . that they had their own contract drawn up for the employees that wanted to stay." (Tr. 853-856, 877-878.)

When foreman Joseph Monken telephoned Barnhart after work on August 11 and asked for his assignment the next day, Barnhart asked if he was working Friday. Barnhart said "Well, if you work tomorrow, you work under the new contract," which was between Monken and the Company [emphasis added]. As Monken credibly testified, Barnhart added that "before I could work I had to schedule" an appointment and "I had better hurry and schedule it quickly because they were going fast." Monken asked "how they could be going fast, there were only seven employees from Local 669 working for him at the time." Barnhart said "this involved Local 536 as well." (Tr. 884-886.)

About 5:30 that same afternoon, as Lawrence Miller Jr. credibly testified, Barnhart called and "told me that we was no longer going to be a union, that we was working under a new contract" (emphasis added) and asked "if we was going to continue to go to work." Miller Jr. telephoned Bolyard about 9:30 the next morning to find "what the new contract consists of." It is undisputed that Bolyard went over "what the new

contract was and that we was no longer union." (Emphasis added.) Miller Jr. continued working. (Tr. 1016-1017.)

It is also undisputed, as journeyman Lawrence Miller Sr. credibly testified, that when Barnhart called on August 11 and asked if he was working the next day, Barnhart told him "we're no longer union, we're going to be working under a new contract." The next day he called Bolyard, who also told him that "we would be nonunion working under a new contract." (Emphasis added.) He continued working. (Tr. 1023-1024, 1033.)

The Company did not decided until August 12 what wage rates, in the sliding scales, it would offer the current employees. When Bolyard told journeyman Sampson earlier that week that the "20-year marriage" of the Company and Local 669 was over, as discussed above, and Sampson asked "what was he going to offer," Bolyard answered, "I can't tell you at this time, there will be a later date that I'll tell you what if you stay" (Tr. 1007). Then on August 11 when foreman Richard Newsome asked Forsythe at the FANX jobsite "what the wages were going to be for the guys, Forsythe said he did not know, he "would have to get in contact with the office" (Tr. 586).

Forsythe revealed at the trial that on Friday morning, August 12, "we decided to make all the rates pretty much the same across the board for the guys that were working here." He then discussed the employee classifications, wages, and working conditions with the employees individually, with no union representative present. (Tr. 121-122, 1306.)

In the interviews Forsythe told the union members who "wished to stay working" that the Company was paying journeymen $ 17 (in the journeyman sliding scale from $ 10 to

$ 17 an hour) and foremen $ 20 (in the foreman sliding scale of $ 17 to $ 22 an hour). When Forsythe told journeyman Todd Rife that his pay would be $ 17 an hour, Rife said he was then working as acting foreman at FANX and "I thought I should be getting more money to be a foreman." Forsythe checked with Bolyard, who authorized him to pay Rife $ 20 an hour--reduced to $ 17 the following Monday. (Tr. 298-299, 427, 506-508, 516, 714, 888, 997-998, 1007-1008.)

Forsythe again checked with Bolyard when Michael Ford, a fifth-year apprentice, asked for at least the journeyman rate because "I had only 2 weeks to go" (to be a journeyman). The answer was no. Forsythe reduced his wage rate for that 2 weeks from the union $ 18.67 rate, plus benefits, to $ 14.50 an hour, without benefits. (Tr. 602-603.)

In their negotiations with Forsythe over wages, several of the employees sought a foreman or lead foreman rate, but Forsythe refused to agree to the requested higher rate (Tr. 271, 299, 508, 644). Foreman Ronald O'Connor credibly testified (Tr. 299) that when he talked to Forsythe that Friday, I told him that I was [the Company's . . . top foreman, for the last 13 years, and I would like to have top pay of $ 24 for top foreman. He told me no, I was going to get $ 20 an hour. After a little bit [of] bickering back and forth, I said I'd settle for $ 20 an hour.

Forsythe explained to the union members the Company's new policy on what tools the employees must furnish and the benefit program (Tr. 364-365), which was later summarized in part on the following printed form (G.C. Exh. 85 p. 3; Tr. 1275):

HEALTH INSURANCE: Blue Cross/Blue Shield of MD; 80/20 Plan available after 6 months of employment at $ 33.00

a week for single coverage, or $ 88.00 a week for family coverage.
PROBATIONARY PERIOD: 6 months
VACATION: No vacation
HOLIDAYS: No holidays
BASE RATE:
OVERTIME:
PENSION: 401K Plan with 10% matching after 6 months of employment of when enrollment time occurs.

The Company had not negotiated with the Locals what classification it would assign each employee or what wage rate in the sliding wage scales it would pay each of them. It had not notified the Locals what tools the employees would be required to buy, when medical insurance would be offered and at what cost to the employees, or what 401(k) contributions the Company would make. It also had not notified the Locals that it was initiating a 6-month probationary period and eliminating vacations, holiday pay, and other benefits in the expired agreements.

The Company in its brief ignores this evidence, as well as the repeated references by Bolyard and Forsythe to the employees' negotiating individually with the Company and the statements by them and Barn hart to some of the employees that the Company was nonunion.

Concerning Local 536 the Company contends in its brief (at 16) that there was "no information presented to employees which was not presented to the local union, and there is no extrinsic evidence of any kind of an effort to disparage or minimize the status of the union as bargaining representative." It contends (at 17) that it "has simply informed employees of the new operative terms of a post-impasse unilateral change"

and that there was no "specific evidence of efforts to negotiate in derogation of a union's bargaining agent status."

Concerning Local 669 it contends (at 23) that "there is ample evidence that the employer advised employees of the terms of the post-impasse employment package, but no evidence that the employer sought to negotiate with employees, either individually or in committees, or that the employer otherwise bypassed the union in violation of the Act."

To the contrary, having found no valid impasse, I find that the evidence is clear that the Company, operating nonunion, bypassed the Locals and dealt directly with the individual employees in derogation of the Locals' status as exclusive bargaining representatives of the employees, violating Section 8(a)(5) and (1) of the Act.

D. Unilateral Changes

1. Mandatory subjects of bargaining

The unilateral changes the Company made on and after August 11 in mandatory subjects of bargaining include the following (Tr. 1274-1278; G.C. Exhs. 12, 20, 58, 59, 84, 85 p. 3):

1. Nullifying the separate bargaining units that were based on the Locals' territorial jurisdictions.

2. Reducing the $ 21.45 and $ 22 an hour journeyman rates to a sliding scale of $ 10 to $ 17 an hour, reducing the $ 22.75 and $ 23.50 foreman rates to $ 17 to $ 22 an hour, and reserving the right to determine and change the employees'

classifications and wage rates at the Company's sole discretion (Tr. 861-862).

3. Abolishing the 5-year apprenticeship program in the expired NFSA agreements and the apprentices classification and its percentage scale (from 35% to 85% of the journeyman wage rate), without providing the AFSA apprenticeship program offered the Locals in the partial-page proposal (Tr. 138, 833-835, 840, 864).

4. Issuing a list of 17 "tools that each employee is required to have in order to work," costing each employee from about $ 300 to $ 400, plus the cost of replacements (Tr. 303-304, 307, 309, 365-374, 647, 836, 888; G.C. Exhs. 28, 29, 84).

5. Eliminating the NASI union health benefits, which provided employee and family coverage at no cost to the employee, and replacing them with an optional medical plan costing the employee $ 33 a week for single coverage and $ 88 a week for family coverage, with no coverage for 6 months (Tr. 59-61, 837-838).

6. Abolishing the NASI union pension benefits (Tr. 835).

7. Abolishing grievances and arbitration (Tr. 835-838, 861-862).

8. Abolishing the contractual territorial jurisdictions of the Locals for job assignments and requiring all employees "to have their own means of transportation to the various jobsites around Maryland, D.C., and Virginia" (Tr. 692-693; G.C. Exh. 39).

9. Eliminating the overtime, show-up, lunchtime, holiday, and vacation provisions (Tr. 834, 889).

10. Initiating a 6-month probationary period.

11. Eliminating Local 669's jobsite inspection privileges for adjusting disputes, investigating working conditions, and contract compliance (G.C. Exh. 59 p. 11, art. 10).

12. Eliminating travel expenses in the Local 669 bargaining unit (Tr. 833-834, 889, 1000, 1018, 1026-1029).

13. Reserving an unrestricted right to subcontract work for economic reasons (Tr. 840).

It is well established that, except in exceptional circumstances (such as economic exigencies compelling prompt action--not present here), when a collective-bargaining agreement expires, "an employer must maintain the status quo on all mandatory subjects of bargaining until the parties either agree on a new contract or reach a good-faith impasse in negotiations." *Triple A Fire Protection*, 315 N.L.R.B. 409, 414, 422 (1994).

The General Counsel contends in his brief (at 78) that "Once it is established that no impasse occurred, it follows by necessity and by operation of law that all changes in wages, hours, benefits, and other terms and conditions of employment that the [Company] implemented on and after August 11 violated Section 8(a)(5) of the Act." The Company contends in its brief (at 14-16, 22-23) that because "there was a good-faith impasse in negotiations," there was "no unfair labor practice in unilaterally implementing the Company's proposal."

Having found that the Company bargained in bad faith, precluding valid impasse, I reject the Company's good-faith impasse defense and find that its unilateral changes in the mandatory subjects of bargaining on and after August 11 violated Section 8(a)(5) and (1).

2. Changes in scope of bargaining units

I also find that even apart from the Company's nullifying the separate bargaining units based on the Locals' territorial jurisdictions, it made a unilateral change in the scope of the bargaining units without the consent of the Locals. It created a new "helper" classification outside the contractual recognition clauses in the expired agreements, which covered "All journeymen sprinkler fitters and apprentices" in the respective jurisdictions.

A similar issue was involved in *Howard Electrical & Mechanical*, 293 N.L.R.B. 472, 474-476 (1989). There the employer implemented a proposed "pre-apprentice" classification for employees who "shall be primarily used for performing work which does not require all the skills of a journeyman" and "may be assigned to perform work for which they are qualified, under the direction of a journeyman." The Board, pointing out that the proposed new classification of workers "would perform traditional bargaining unit work, but would be specifically excluded from the unit," held in that case:

> The crucial question in the case is whether the Unions consented to the proposed changes in the scope of the unit, changes over which, because of their nonmandatory nature, the Unions were not even required to bargain. In these circumstances, we find that the

> [employer] unlawfully implemented [the] pre-apprentice proposals because they concerned subjects which the Unions were not required to bargain about and the implementation was done without the consent of the Unions. . . . We find that the implementation of the [proposals] violated Section 8(a)(5) and (1).
>
> Here the Company, without the consent of the Locals, implemented its proposed "helper" classification of employees who would be outside the scope of the bargaining units of journeymen and apprentices, yet would be performing traditional bargaining unit work.

I note that Local 536 agreed in the Grinnell contract to a "pre-apprentice" classification of employees, who would be doing helper work until they became apprentices and who would be included in the bargaining unit with a specified wage rate and benefits and would work under specified restrictions (G.C. Exh. 16; R. Exh. 8). As found, however, McCusker would not even discussed the Grinnell concessions with Fique in the third Local 536 bargaining session on August 4, before McCusker declared an impasse on August 9.

I also note that Fique sent a handwritten note to President Bolyard on September 2, stating "I assume that [Counsel McNeill] Stokes will not allow you to return my calls." Referring to the "very competitive" Grinnell contract and offering to "start working together," Fique sought employment for the Local 536 members, asserting "We have the best sprinkler fitters in the country." Bolyard did not respond. (G.C. Exh. 17).

I find that the Company's implementation of its proposed change in the scope of the bargaining units, creating the new "helper" classification outside the bargaining units without the Locals' consent and nullifying the separate bargaining units based on the Locals' territorial jurisdictions, violated Section 8(a)(5) and (1).

E. Refusal to Hire and Reinstate Locals' Members

1. Shortage of qualified sprinkler fitters

a. Inadequate staffing at FANX

On August 11, when the Company implemented its partial-page proposal as the "new contract" and began operating nonunion, it was behind schedule on its large FANX project in the Baltimore area. The FANX general contractor had complained about the "general inadequacy" of the Company's manpower there, the "failure to achieve scheduled durations," and the failure of the "actual" manpower to reach the "proposed" level (Tr. 268; G.C. Exh. 32 pp. 1, 4).

I infer that the Company had been delaying the hiring of additional employees until it implemented the nonunion proposal, expecting the Locals to strike and planning to advertise for experienced employees to permanently replace the union journeymen.

The Company had made the partial-page proposal to Local 536 on July 25. As the General Counsel points out in his brief (at 15-16), McCusker claimed on the first day of trial that he did not remember whether his work on the August 14 newspaper ad began "before or after July 25" (Tr. 87-88). The

General Counsel argues that the Company "plotted to get rid of" its union members. The Company had already announced in its July 22 letter to Local 669 that "we intend to implement [the partial-page proposal] on August 1." It was under these circumstances that the Company was operating with a manpower shortage and was not calling the business agents for union fitters as before.

President Bolyard obviously recognized this manpower shortage at FANX when he went to the Shot Tower subway jobsite to implement the partial-page proposal on August 11 (not August 10 as journeyman Roy Rife erroneously recalled). Although the work there was not completed, Bolyard told the whole crew that "anyone that wanted to continue working" for the Company, to report to FANX the next day (Tr. 150, 221, 234, 257, 286). Apprentice Hood credibly recalled that Bolyard said the "Shot Tower job could wait" (Tr. 234). Rife credibly testified on cross-examination that he understood that Bolyard was moving the whole crew to the FANX job, "which was running behind." (Tr. 171-172.)

The conversion to a nonunion operation and the hiring of nonunion employees, however, did not solve the manpower shortage at FANX.

b. Less-qualified nonunion replacements

Although the anticipated strikes did not occur, there was a considerable turnover of employees, giving the Company the opportunity to hire nonunion replacements. The Company's newspaper ads for experienced employees on August 14 and 28, however, did not produce a sufficient number of qualified applicants for the vacated fitter jobs and the additional sprinkler fitters needed. As McCusker admitted, the (nonmembers')

response to the newspaper ads was "predominantly from helpers without many skills" (Tr. 1451).

Refusing to hire any of the Locals' members who applied, as found, the Company was evidently hiring mostly less-qualified nonunion employees who did not meet its standards for the $ 17 journeyman fitter rate and $ 20 qualified foremen rate that it was paying the union journeymen and foremen, who had gone through 5 years of apprenticeship training under the NFSA contracts (Tr. 849; G.C. Exhs. 20, 49).

The qualifications shown on the nonunion employees' applications cannot be compared with the union employees' qualifications because the Company produced only two of the new employees' subpoenaed applications. It contends in its brief (at 31 fn. 9) that "there is no evidence of any intentional concealment or disposal of relevant records in this case." I note, however, that Forsythe testified that all new employees filled out application forms and McCusker testified that the applications are "always kept." The Company does not disclose what happened to the remaining nonunion employees' applications, showing their qualifications. (Tr. 849, 1260-1261, 1279-1280; G.C. Exh. 41 pp. 1, 2.)

By the time of trial the Company had hired a total of 47 new employees--all nonunion (nonmembers of Locals 536 and 669). The lists in evidence of 51 new employees include two "No Shows" (on November 28 and 30) and two nonunit inspectors. Of the eight nonunion foremen (including Reid, its foreman at FANX), the Company paid its $ 20 qualified foreman rate to only two of them (Reid and Michael Carroll). It paid the other six foremen from $ 15.50 to $ 18.50 an hour. (R. Exhs. 11, 12; Tr. 449-450, 771, 972-973, 1248-1249; G.C. Exh. 30.)

The Company paid its $ 17 journeyman rate to only 2 of the 23 nonunion fitters, besides the unexplained higher rates it paid 4 fitters beyond the $ 10-$ 17 sliding scale offered the Locals in negotiations. (It paid nonunion fitter Keith Hamilton $ 20 an hour and nonunion fitters Joseph Sarro, Terry Klender, and Robert Dietrich, whom it later hired in 1995, the rates of $ 20, $ 17.50, and $ 18.) It paid the other 17 fitters (except short-time fitter Joseph Samia, whose wage rate is not disclosed) from $ 11.50 to $ 16 an hour--averaging $ 14.06. Not receiving the $ 17 journeyman rate, they evidently were less qualified. (R. Exhs. 11, 12.)

The remaining 16 of the 47 new employees were untrained helpers, whom it paid from $ 6.50 to $ 10 an hour (except Gary Showalter, whom it paid $ 13)--averaging $ 8.02 an hour. (R. Exhs. 11, 12.)

It is undisputed, as apprentice Stefan Buitron (a Local 536 member) credibly testified, that sometime in September when asking for a raise, he told Forsythe that the (nonunion) employees at FANX "were a joke. . . . half of them had no idea what they were doing." Forsythe did not respond to this criticism. (Tr. 744-745.)

Buitron explained: "I've been working four years and these guys had said they was working longer than I had, and I'm leading them around by the hand showing them what to do." He testified that whereas a journeyman fitter normally would install "at least 30" sprinkler heads a day, he observed that nonunion fitter William Hax (hired 9/12/94 at $ 12 an hour) installed "maybe five sprinkler heads a day." Nonunion fitter Stacy Gillis (hired 8/29/94 at $ 13) installed on an average about 10 or 12 heads a day. Nonunion fitter Urban Hohman

(hired 9/19/94 as a "foreman walk-in" and paid $ 15.50 an hour) was also "very slow." (Tr. 745-747; R. Exhs. 11, 12.)

It is undisputed, as Local 536 member Todd Rife credibly testified, he informed McCusker there were men on the job (at FANX) "claiming to be journeymen that were in no way journeyman material." He gave as an example fitter William Hax, who was "particularly slow" and who had twice installed pipe wrong. Todd Rife knew, "Because I had to go back and fix it at a later time." (Tr. 537-538.)

It is also undisputed that Todd Rife had "numerous conversations" with foreman Charles Reid about William Hax, telling him that Hax "was not performing like a journeyman should be performing," was "extremely slow," and "didn't have knowledge that a journeyman should have." Reid (acknowledging the manpower shortage) told Todd Rife that "even if [Hax] only was able to install one or two lines a day, that was one or two less that they had to do." (Tr. 539.) Reid conceded that "We needed experienced fitters" on that "big job" (Tr. 1129).

At one point McCusker admitted that the Company was not requiring the new employees to be qualified sprinkler fitters. Referring to the list of new nonunion employees (R. Exh. 11), which shows that Harry Jordan was a "fitter walk-in" hired 10/13/94 (and paid $ 12 an hour), McCusker testified: "Well, Harry Jordan says fitter, but if you ask me, he's just a high-priced helper [emphasis added]." (Tr. 1415; R. Exh. 12.)

c. Multiple complaints of manpower shortage

Evidently the shortage of qualified nonunion sprinkler fitters and the use of untrained helpers aggravated the manpower

shortage at FANX. The complaints from the FANX general contractor multiplied, as shown by subpoenaed documents that the general contractor produced. Although these documents were also subpoenaed from the Company, it failed to produce any of them. (Tr. 385, 454-457, 1437, 1449; G.C. Exh. 32.) The documents include the following complaints:

On August 15 (G.C. Exh. 32 p. 8), that the Company "has failed to start on the 7th Floor as was scheduled for last week."

On August 25 (p. 9), the "ceiling grid is scheduled to start @ Blocks 3 of Floors 2 & 6. Your work is seriously behind in these blocks. Please take immediate corrective action to avoid delay to following trades."

On August 30 (p. 10), only 13 men on the job. The grid is scheduled to start on floors 2 & 6 (block 3), but your work is only 10% at 2d floor and 0% at 6th floor. On 7th floor, no pipe on site, but you should be 100% at block 1 & 50% at block 2. On 3d floor, no pipe on site, but you should be 50% complete at block 1.

On September 16 (p. 12), that the Company "is still not meeting the schedule requirements in many areas on this project. . . . it appears to stem directly from [the Company's] labor problems and manpower shortages [emphasis added]." As we discussed by telephone today, "my staff had been informed by [the Company's] employees that pre-punch work at Block 1 of second and sixth floors (punch list scheduled for September 19, 1994) could not be done due to lack of available manpower [emphasis added]."

On September 22 (p. 14), "The schedule for Block 2 of the 7th floor calls for the grid to start on September 22, 1994. At

this time, no sprinkler piping has been installed, thereby causing delay to the project."

On October 6 (p. 15), the "grid was to start today on 0703. However, since [the Company] has not even started in this area, it is impossible for grid to start. This project cannot tolerate this type of delay."

On October 10 (p. 16), the Company's "performance on this project continues to be in extremely poor condition. Five deficiencies listed. "The conditions result from manpower problems [emphasis added]. . . . Mr. Bolyard represented that a short push with "20" men could be accomplished. This push is needed."

On October 18 (p. 17), the Company's "work on this project is still in urgent need of additional manpower [emphasis added] to improve performance and progress." Duane Forsythe of your office stated that the Company's "work on other projects is winding down, which will enable [the Company] to shift more manpower to this project."

On October 20 (p. 19), the Company's "effort on this project is nothing other than sad. The hydro-test scheduled for the sixth floor for this morning cannot be accomplished" for "insufficient manpower, lack of overtime, and lack of support from your office [emphasis added]."

On October 28 (p. 20), the Company is "continuing to present a multitude of schedule deficiencies," listing six listed deficiencies including "Hydro not complete in more than 50% of 6th floor (core and North half)."

On November 14 (p. 21), the Company is "far behind schedule . . . is causing . . . further delays," and "stands out as seriously behind all other trades." Two items are listed 50% completed, but should have been done in September and early October. Nine other items are listed as 0% completed, but should have been done from early October to mid-November.

On December 14 (p. 23), "Yet again your manpower has dramatically fallen off. The negative impact of this was clearly seen at today's scheduling meeting . . . especially on Floors 3, 7, 4 and 5. I cannot urge you enough to cure this problem permanently."

On January 9, 1995 (p. 24), the "Hydro is seriously late at third floor. 0403 rough-in is barely underway which is stopping grid (which should have started 12/19/94)," etc.

On January 12, 1995 (p. 25), the "extremely poor progress being achieved by [the Company] on this project" is causing "growing displeasure of other contractors, which could result in claims."

d. Fabricated denial of shortage

On the last day of the trial McCusker flatly denied that he had a shortage of manpower at FANX. He blamed "severe errors and omissions" in the job contract documents for "being behind on the job." (Tr. 1438-1439.)

When specifically questioned about the report in the FANX October 10 complaint (G.C. Exh. 10 p. 16) that President Bolyard told the construction manager that a short push by 20 men could be accomplished, McCusker testified that what the manager "didn't realize was that that was going to be needed

then again and again and again" (Tr. 1440-1441). In doing so, he inadvertently conceded the manpower shortage at FANX. He did not concede how the employment of evidently less-qualified fitters and untrained helpers adversely affected the Company's performance there.

Next, when asked the direct question, "Is your testimony that at all times you had enough workmen on the job?" he positively answered, "Yes." Then when asked, "Did you have at all times the number that you had projected?" he answered (Tr. 1441):

No, probably not. Maybe I did. Maybe I had more. . . . I'd have to check the daily reports. I don't know. It may have been a man or two short. Guys get pulled out of FANX to go do service work from time to time, answer calls. Sometimes they go there to finish out a day, because it's kind of centrally located.

By his demeanor when answering the question, McCusker appeared to be endeavoring to fabricate something that would sound plausible.

When the Company called its FANX foreman Charles Reid as a defense witness, he testified on cross-examination that experienced fitters were needed the entire time he was at that jobsite (Tr. 1180);

Q. [BY MR. SOKOLOW] Did you ever tell Mr. Forsythe that you needed experienced fitters?

A. That was common knowledge. I'm sure I told him numerous times.

Q. Did you ever have conversations yourself with Mr. McCusker where you told Mr. McCusker you needed experienced fitters at FANX?

A. I'm sure at one time or another if we were talking I said we needed people there.

Q. Did you ever tell Mr. Bolyard that you needed experienced fitters at the FANX 3 site?

A. I can't say. That was basically common knowledge. It was very obvious. I don't think that I had to really tell anybody. That was a fast-moving job. [Emphasis added.]

I find that McCusker was deliberately giving false testimony when he denied having a shortage of manpower at FANX. I also discredit Forsythe's claims that he did not recall Reid's telling him that there was a shortage of fitters there (Tr. 1227). By his demeanor on the stand, Forsythe appeared willing to give any testimony that might support the Company's cause.

2. Refusal to hire union members

a. Members of Local 669

The evidence reveals that until the Company placed the August 14 newspaper ads for experienced employees, it had not adopted the policy of requiring union applicants to submit a written application, which it filed without hiring any of them.

LAURENCE DAVIDSON. In the second week of August before the ads appeared, journeyman Davidson, a former employee who was a member of Local 669, went to the office to apply for employment. He asked Kimberly Goldbeck to

speak to Bolyard or McCusker. She told him "you don't have an appointment, you can't see anyone today," without giving him an application. (Tr. 723-725, 728-729.)

The evidence shows that Goldbeck, classified as a secretary-receptionist, holds a responsible position in the small office. McCusker admitted that she is authorized to speak to the Company's workers compensation insurance company. The evidence also shows that she speaks for the Company on various personnel matters in its dealings with employees and others. (Tr. 65, 153-154, 157, 175-176, 287, 297, 414-415, 459-460, 476, 478, 593, 637, 639-640, 725-730, 895-898, 904, 1195-1196, 1200; G.C. Exhs. 23, 24, 33, 34, 35, 47 p. 3.) The employees would reasonably believe that she reflects company policy and speaks on behalf of management. I therefore find that she is an agent for the Company under the principle of apparent authority. Einhorn Enterprises, 279 N.L.R.B. 576 (1986).

On August 18, after seeing the August 14 newspaper ad, Davidson returned to the office and told Goldbeck "I'd like to have an application for the sprinkler fitter job." As he credibly testified, she "looked at me kind of funny" and said "Are you union or a--" He responded, "I'm union, why? Are there two different applications?" She paused and said, "You're Larry Davidson, aren't you?" He said yes. She handed him an application. He filled it out, showing prior employment at Grinnell (which, like the Company, had employed union members under NFSA union-shop agreements). She said that McCusker or Forsythe would give him a call, but neither of them did. (Tr. 726-727, 1199-1200; G.C. Exhs. 2, 21.)

I find that both in his pretrial affidavit and at the trial, McCusker gave false information about the Company's failure

to hire Davidson. In the September 15 affidavit (G.C. Exh. 45 pp. 21, 26) he claimed, on his personal knowledge, that Davidson required a wage of $ 21/hour. That position only paid $ 17/hour. On September 5, 1994, I attempted to reach him by telephone to discuss his employment application. I left a message on his answering machine. He never called me back." In its September 15 position statement, to which the affidavit was attached (G.C. Exh. 45 p. 7), the Company unequivocally contended that Davidson "was not hired [as a sprinkler fitter] because he wanted $ 21.00/hr."

McCusker was questioned at the beginning of the trial how he had personal knowledge that Davidson required a $ 21 wage, even though Davidson had specifically indicated on his application that his desired salary was "Open." McCusker claimed that "we knew that Larry had been probably making $ 21 an hour. We wanted to check. If the guy didn't have it written down, we would call him at home and find out for sure what they wanted to make. . . . I never did find out exactly what he wanted to make." (Tr. 14-17.) Yet he later admitted, contrary to this testimony and the Company's unequivocally position on September 15 (Tr. 849):

Q. Was it the company's policy to reject applicants who requested a wage rate on their application higher than the rate the company was currently paying?

A. No, that wasn't the policy.

The Company was offering its new nonunion rates to those it was willing to employ, regardless of their previous wages and their desired wage rate (Tr. 1268).

I discredit, as fabrications, McCusker's claim that Davidson required a $ 21 wage, his claim that he attempted to reach Davidson by telephone "to discuss his employment application," and his claim that if the applicant did not write down his desired salary, "we would call him at home and find out for sure what they wanted to make." Instead, as discussed later, the Company was merely filing the union employees' applications and was hiring nonunion "walk-ins" and persons referred by nonunion employees it had already hired.

On the 9th day of trial McCusker raised another defense, not mentioned earlier. This time he claimed that a former superintendent had told him more than once "that he would never hire Larry Davidson under any circumstances ever. . . . The guy is worthless as a fitter" and "I wouldn't hire him, not even as a helper, I don't believe." (Tr. 1399-1400.) I discredit this apparent afterthought as another fabrication. I note that at one point on the first day of trial when asked, "What is the reason the company did not hire Larry Davidson," McCusker had claimed, "I don't remember" (Tr. 17).

EDWARD SAUNDERS. Journeyman Saunders (a Local 669 member who lived in Mt. Ranier, Maryland, near Washington, D.C.) had previously worked for the Company and had been in contact with Bolyard. On August 23 he submitted his written application, showing that he last worked as a foreman for Grinnell. He called back on September 6 but was never offered a job, even though the Company needed fitters in Local's 669 jurisdiction, both in southern Maryland at the Patuxent River Naval Air Station and at Dulles Airport in Virginia. (Tr. 141, 464, 865-871, 1231; G.C. Exh. 41 p. 15).

On August 29, the week after Saunders submitted his application, the Company hired five nonmember fitters,

including journeymen Joseph Edelen and Keith Hamilton (paying them $ 17 and $ 20 an hour) to work at the Naval Air Station (although, as discussed later, he initially assigned them to work temporarily at FANX). On September 6 it also hired a $ 16 "walk-in" fitter Bryan Duck to work at the Naval Air Station. The other three fitters it hired on August 29 were (like Duck) evidently less-qualified nonunion fitters: a $ 13 fitter Stacy Gillis, a $ 15 fitter Daniel Green, and a $ 15 "walk-in" fitter Daniel Green. (Tr. 1317-1319; R. Exhs. 11, 12.) Although the Company was no longer recognizing the territorial jurisdictions of the Locals for job assignments, it did not offer Saunders a job either in the Baltimore area (Local 536's jurisdiction) or outside that area (Local 669's jurisdiction).

JAMES SPITZER. Journeyman Spitzer (a former employee who lived in Laurel, Maryland, between Washington and Baltimore) went to the Company's office to apply for a job on August 12 (the first day after the Company implemented the "new contract"). Goldbeck asked him if he was in the Local and he answered yes, he was a member of Local 669. She said "they were not sure of what they were going to do because they were in a labor dispute with Local 669." She did not give him an application form. (Tr. 894-896.)

Spitzer returned on August 22 after seeing the Company's newspaper ad and submitted a written application, listing Grinnell and other union companies as employers where he had worked as fitter and foreman. Goldbeck said that Forsythe was not available at that time to interview him, but that Forsythe "would be getting in touch with me." (Tr. 897-899; G.C. Exh. 41 p. 11.)

Forsythe never called Spitzer to work at the Naval Air Station, Dulles Airport, or in the Baltimore area, despite the

Company's continuing need for additional employees and its hiring nonunion fitters and foremen who were evidently less qualified (not being paid the Company's nonunion rates of $ 17 for journeymen and $ 20 for qualified foremen). Besides the three lower-wage fitters it hired a week later on August 29 (paying them $ 13 to $ 15 an hour), it hired 12 additional lower-wage fitters before trial (paying them $ 11.50 to $ 16 an hour) and four lower-wage foremen (paying them $ 15.50 to $ 18.50 an hour). (Tr. 898; R. Exhs. 11, 12.)

STEPHEN GRIFFITH. Journeyman Griffith lived in Chantilly, Virginia, near Dulles Airport. On August 26, in response to the Company's newspaper ad, he submitted his application, showing that he had worked for years as a foreman for Grinnell. The Company never hired him, despite the Company's need for qualified fitters at Dulles Airport and elsewhere. (G.C. Exh. 41 p. 13; R. Exhs. 11, 12.)

b. Members of Local 536

SCOTT DYOTT. On August 31 journeyman Dyott submitted his application, showing that he was last employed at Grinnell. He gave Local 536 Business Manager Fique as a reference. In the following 3 weeks the Company hired three evidently less-qualified nonunion fitters: a $ 16 "walk-in" fitter Bryan Duck on September 6, the "extremely slow" $ 12 fitter William Hax on September 12, and a $ 13 fitter Ricky Butler on September 20. The Company was receiving continuing FANX complaints, including the one on September 16 that the Company "is still not meeting the schedule requirements in many areas on this project" because of "manpower shortages," as quoted above. Yet, the Company never offered to hire Dyott. (G.C. Exh. 42; R. Exhs. 11, 12.)

MELVIN HAYNES. Journeyman Haynes previously worked for the Company and last worked for Grinnell, as shown on his August 29 application. Like Dyott, he was not hired, despite the Company's continuing need for fitters and its hiring evidently less-qualified nonunion fitters. When he called the Company the week after he submitted his application, Goldbeck told him that Forsythe "was supposed to have called me for employment." About 2 weeks later, after receiving no call from Forsythe, he called Goldbeck back. She then untruthfully told him "they weren't hiring at the time." Forsythe never called him. (Tr. 634-637; G.C. Exh. 46 p. 8.)

DAVID REHBEIN. Journeyman Rehbein, in response to the Company's August 28 newspaper ad, submitted his application on August 30, showing Grinnell as a former employer. Forsythe interviewed him and reviewed his application. Although the application showed that Rehbein lived in Pennsylvania and although there were available jobs at the FANX jobsite in the Baltimore area, much nearer Rehbein's home, Forsythe told him "we [have] a lot of work coming up. . . . we got a couple of jobs coming up within the next two weeks" at Dulles Airport (in Virginia) and down in southern Maryland (at the Patuxent River Naval Air Station). Rehbein said he was interested and asked "can you let me know either way?" Forsythe answered, "No problem," but he failed to do so. (Tr. 457-464; G.C. Exh. 3.)

I note that although both projects were in Local 669's jurisdiction, Forsythe never offered any of the jobs to Local 669 members Davidson, Spitzer, Saunders, and Griffith who had submitted their applications on August 18, 22, 23, and 26.

Rehbein heard nothing from Forsythe until October 26 (nearly 2 months later)--after Local 536, Local 669, and six

individual union members had filed NLRB charges against the Company. Forsythe then called and said, "I have a job starting down in southern Maryland" (about 1-1/2 hours from the shop and 2-1/2 hours from Rehbein's home) and asked if Rehbein wanted it. After Rehbein answered yes, Forsythe said it paid $ 12 an hour. Rehbein protested, "I'm a journeyman." Forsythe then said that "all we really need is helpers." Rehbein refused to accept $ 12 an hour on a job that would require him to spend 5 hours a day in travel. (Tr. 465-466; G.C. Exh. 1.)

I find that the Company was not offering him the job in good faith. As it had done with other applications submitted by the union employees, it merely filed Rehbein's August 30 application--until the Company was faced with multiple charges alleging its unlawful conduct. Then when it learned that Rehbein was still willing to work outside the Baltimore area and travel 5 hours daily, round trip, it claimed that it needed only helpers.

In its brief (at 29) the Company's gave as its only explanation for not hiring Rehbein: "Rehbein was, in fact, offered work in Southern Maryland by Dewey Forsythe, but declined the offer himself because of dissatisfaction with the wages and travel distance involved."

I reject, as frivolous, the contention made in the Company's October 11 position statement that the Company "chose not to hire [journeyman Rehbein, as well as journeymen Dyott, Haynes, and Stricker] because they lacked adequate skills, abilities, and quality of workmanship to perform the job adequately" (G.C. Exh. 46 p. 1).

STEVEN STRICKER. On August 30 journeyman Stricker, a former employee, telephoned the Company about its August

28 newspaper ad and spoke to Forsythe. He told Forsythe that he "was a sprinkler fitter from Baltimore." Forsythe said, "Sounds good," that "We won't be hiring for a week or two," but to come in and fill out an application and he "would call me back." Stricker submitted his application that day, showing that he had been working as a Grinnell foreman. Forsythe never called him. (Tr. 694-699, 702; G.C. Exh. 46 p. 4; R. Exh. 2).

3. Refusal to reinstate Local 536 members

With the exception of foreman Ronald O'Connor, who was injured August 30 and reinstated in late September--after Local 536, Local 669, and six individual union members filed NLRB charges against it--the Company was refusing to follow its prior practice of reinstating injured union members upon their recovery and return to work, without requiring them to file an application (Tr. 474, 711, 876-877). President Bolyard admitted (Tr. 106):

Q. In the past, before August 11, 1994, isn't it true that employees who were injured on the job routinely came back to work for your company when they were medically capable of doing so?

A. If they were able to do the work and if we needed them, yes, I would say so. We would not discriminate against them.

McCusker admitted that "if we had an injured employee who was ready to come back to work and we had a place for him," it "would not have been uncommon" for the Company to reinstate him without requiring him to fill out an application (Tr. 33-34).

FREDERICK KRAEUTER. Journeyman Kraeuter was injured about March 9 when working for the Company as a foreman. On August 11 Goldbeck informed the insurance company that the Company "planned to rehire" Kraeuter and on August 15 sent it a memo, enclosing Kraeuter's doctor's slip and stating, "It is possible that Mr. Kraeuter will be returning to work on August 22, 1994 after his doctor visit." (Tr. 474-45, G.C. Exhs. 33, 34.)

Having seen the Company's August 14 newspaper ad, Kraeuter went to the office on August 15 to "inquire about my status.' He asked Goldbeck if he had to fill out an application. She said, "I guess you had better" and asked (contrary to her denial), "Do you know that [Bolyard's] going nonunion?" Kraeuter answered that "from the looks of [the newspaper ad] and everything, that seems to be what's happening. But I still need a job." He submitted his August 15 application. (Tr. 475-477, 1198; G.C. Exh. 41 p. 12.)

On August 17 Kraeuter talked to Forsythe about being released by the doctor soon and needing employment. Forsythe said that he was looking over the applications, had not hired anybody yet, but "would let me know." Not hearing anything, Kraeuter called Forsythe the next week and said he was being released that Friday, August 26. Forsythe said he was "still looking over the applications." (Tr. 477-478.)

Then, after giving Goldbeck his doctor's August 26 "Return to Work" slip (releasing him to return on Monday, August 29) and learning that Forsythe had hired six nonunion employees, Kraeuter asked Forsythe "Why wasn't I hired." Forsythe answered that he thought three or four of them were helpers and "the other two applications he liked better." He promised

that if "he was going to hire again," he would "give me consideration." (Tr. 478-479; G.C. Exh. 35.)

Although all of the applications were subpoenaed, none of the six new employees' applications was produced at the trial. The Company's own evidence (R. Exhs. 11, 12), however, shows that only one of the six new employees was a helper (not "three or four"). As indicated above, three of the others were evidently less-qualified fitters (a $ 13 fitter Stacy Gillis, a $ 15 fitter Daniel Green, and a $ 15 "walk-in" fitter Daniel Green).

After his conversation with Forsythe, Kraeuter saw Bolyard in the yard and asked him "Why was an ad in the paper? Why I had to go through all this to get my job back?" Bolyard, revealing that the Company had decided not to reinstate Kraeuter, gave the following response, without explanation: "Well, I'm tired of being fucked." (Tr. 480, 491-493.)

The following week, after the Company placed its second ad for experienced employees in the August 28 Sunday newspapers, Kraeuter called Forsythe who said he was "still reviewing my application" (Tr. 482-483). Kraeuter's personnel record states: "Inj. 3/9/94, off 3/31/94-8/29/94. No wrk avail when released." (G.C. Exh. 31.)

McCusker gave an obviously fabricated reason for not reinstating Kraeuter. In his pretrial affidavit (G.C. Exh. 45 p. 25) he falsely claimed that Kraeuter "applied for a position for foreman requesting a wage of $ 22 per hour" and "At that time, and at present, there are no jobs available at that wage rate for that position" (emphasis added). To the contrary, Kraeuter's desired salary shown on his application (G.C. Exh. 41 p. 12) is $ 20 an hour the Company's nonunion rate for qualified foremen. Furthermore, as quoted above, McCusker admitted

that it "wasn't the policy" to reject applicants who requested a higher wage.

The Company's exhibits (R. Exhs. 11, 12) show that on August 30 (15 days after Kraeuter submitted his affidavit), it hired nonunion employee Michael Carroll as a foreman at the $ 20 rate. Besides the false claim that Kraeuter was seeking a $ 22 rate, the Company has offered no explanation for not reinstating him for that job or for other foreman or fitter jobs.

The Company merely argues in its brief (at 37) that it "was not under an obligation or in a position to operate hiring in a manner to guarantee employees who had been out of work on indefinite absences the opportunity to return on demand and to displace other individuals."

RICHARD NEWSOME. Journeyman Newsome was an exceptional employee whom the Company had been employing as a foreman for the last 6 or 7 years on various projects, including the large Shot Tower and FANX projects. McCusker described him as "a genius, absolute genius" and testified, "It's not unlike Dick Newsome to run on more than one job at a time." (Tr. 77-78, 268, 580; R. Exhs. 13 p. 18 and 14 p. 18.)

Following a job injury in May, Newsome had been working on light duty until August 15 when, after being reassigned, he was injured again. On September 6 the doctor gave him a 100 percent release, indicating his full recovery. He immediately called the Company and told McCusker that he had been released 100 percent and was ready to go to work. McCusker referred him to Forsythe, who told Newsome "he would call me that night to let me know where to go to work." Forsythe failed to call him. (Tr. 580-581, 586-593.)

Early the next morning, September 7, Newsome called and again talked to McCusker, who said Forsythe was not there yet but would be there around 7:30. Newsome called at 7:30 and Forsythe was still not there. He called again at 9 and 10 o'clock and each time was told Forsythe was in a meeting. At 11 o'clock, as Newsome credibly testified (Tr. 593):

They put me on hold for quite awhile and then [Goldbeck] said that [Forsythe] was out in the yard and couldn't talk to me then, that there was nothing available right then, that [Forsythe] was still checking into it.

Since that date the Company has never offered Newsome work, either as a fitter or a foreman (Tr. 594). His personnel record states: "Off on W.C. 8/16/94-9/6/94. No work avail after release." (G.C. Exh. 31.)

The Company's only defenses for not reinstating Newsome have been (a) the Company's erroneous contention in its October 18 position statement that "there were no foreman positions available" and "it has not hired a new foreman since September 6" (ignoring its hiring the $ 15.50 "foreman walk-in" Urban Hohman on 9/19/94) and (b) McCusker's false testimony on the first day of trial that until then, "there has been no room for Dick Newsome." To the contrary, the evidence shows that since September 7 the Company has hired 16 sprinkler fitters and 4 foremen. (Tr. 79; G.C. Exh. 47 p. 2; R. Exhs. 11, 12).

In its brief (at 37-38) the Company merely contends that there is no evidence showing an antiunion motivation for its failing to employ Newsome and that the General Counsel has not presented evidence that the Company's failure to offer Newsome work was because of his union membership.

ROY RIFE. Journeyman Roy Rife had been working on and off for Bolyard since the early 1970s (Tr. 148).

When Roy Rife was released to return to work on November 7 following an injury (Tr. 148-149, 155-156; G.C. Exh. 24), the Company had been receiving multiple complaints about its manpower shortage at FANX. As quoted above, the FANX general contractor complained on October 10 about the Company's "manpower problems," on October 18 about the "urgent need of additional manpower," on October 20 about the "insufficient manpower" and "lack of overtime," and on October 28 about the Company's "continuing to present a multitude of schedule deficiencies." These complaints were followed by a further complaint on November 14 that the Company was "far behind schedule."

Meanwhile Roy Rife's son Todd, who was working at FANX, told him that the Company had approached the employees there, wanting to start working 10-hour days (Tr. 159, 176). The Company's job labor costs register shows that its employees at FANX worked 77.5 hours of overtime that week (the pay period ending November 12) and 74.5 hours the following week (Tr. 784-785; G.C. Exhs. 43, 44). As quoted above, the FANX general contractor had complained on October 20 about the "lack of overtime." The Company's FANX foreman Reid testified that experienced fitters were needed the entire time, as was "very obvious" and "common knowledge" (Tr. 1180).

About a week before November 7 Roy Rife informed Goldbeck that the doctor was releasing him to return to work on that date and "the only thing she told me was make sure I had a release the day I showed up for work" (Tr. 157; G.C.

Exh. 24). On November 7 he went to the reception area and asked Goldbeck to speak to Bolyard. After checking, she came back and reported that Bolyard "said he was busy," but that "Mike McCusker would see me." (Tr. 157-158, 174.)

McCusker later came to the reception area where Roy Rife was waiting. Goldbeck had opened her door so she could overhear the conversation. In the conversation that followed, as Roy Rife credibly testified (Tr. 159-160, 175-179):

[McCusker] informed me that I should have called [Goldbeck] to let [McCusker] know I was coming back to work, that at the present time they were laying off, and they didn't have any work."

Q. How did you respond to that?

A. I told him I thought that was very strange, because my son works for the company also, Todd; and Todd had been approached that they wanted to start working 10-hour days at the FANX job.

Q. Did Mike McCusker say anything when you told him that?

A. Mike McCusker seemed to get upset when I said that, and . . . he yelled to Kim [Goldbeck], "We're not working any 10-hour days, are we?" and Kim said, "No." And then I replied, "I didn't say that they were working 10-hour days. I said that they were asked about starting 10-hour days."

Q. What was said next in the conversation?

A. After that, he went behind the partition and came out with a clipboard and said, "Here's an application. If you want, you can fill it out." And I said I would fill it out.

I sat down and filled it out, and . . . before he left, I said, "When you go back, tell Allen [Bolyard] that Roy said hi." And he turned around and came back to me and said, "When you go back, tell [Local 536 Business Manager] Bob Fique I said hi," and he said, "Ha, ha, ha," and went behind the partition and slammed the door.

When called as a defense witness, Goldbeck did not dispute any of this testimony.

On November 8, Intracorp registered nurse Kathleen Radziewicz telephoned Goldbeck on behalf of the workers compensation insurance carrier. Radziewicz testified (Tr. 412-415):

I advised [Goldbeck] that Mr. Rife had been released to return to work. And [I asked] if he still had a job--if he still had a job available for him?

[Goldbeck] said, at the current time, there were no jobs that they had available for him, as he is a union plumber and they had no union jobs available. [Emphasis added.]

Radziewicz appeared on the stand to be a truthful witness; I credit her testimony. Her memory was refreshed by her computer notes, which were shown to the Company's trial counsel but not introduced in evidence. I discredit Goldbeck's denials. By her demeanor on the stand Goldbeck impressed me as being more concerned with giving testimony favorable to the

Company than giving an accurate account of what happened. (Tr. 415-420, 1195-1196.)

Roy Rife's personnel record states: "Inj. 7/22/94 Retrnd: 8/8/94. Off 8/11-11/7; No work avail" (G.C. Exh. 31) Thus at the time, the Company's explanation for its not reinstating Roy Rife was "No work available"--clearly a fabricated defense.

There was a continuing manpower shortage at FANX and employees there were working overtime. The Company was hiring evidently less-qualified fitters instead of reinstating Roy Rife. It hired a $ 15 fitter Frank Pratt on 11/22/94, a $ 15 fitter/foreman Mark West on 11/25/94, and two "No Shows" (a $ 14 fitter Dwight Wetzel on 11/28/94 and a $ 13.50 "walk-in" fitter Charles Heward on 11/30/94). It did not hire any other fitters to replace the "No Shows" until it hired a $ 15 fitter Thomas Geris on 12/19/95. (R. Exhs. 11, 12.)

With the shortage of qualified fitters (unless it hired members of Locals 536 and 669), the Company was hiring many helpers to do bargaining unit work. It hired on 11/3/94 a $ 7 helper Roger Plumley (who quit 11/12/94), a $ 7 helper Daniel Murphy on 11/21/94, a $ 9 helper William Kuperus on 11/22/94, a $ 10 helper Gregory Horn on 12/14/94, a $ 9 helper Christopher Carter on 12/15/94, and a $ 7.50 helper Edward Kelley on 12/16/94 (R. Exhs. 11, 12).

Evidently sometime after the Company submitted its November 28 position statement, McCusker wrote on Roy Rife's November 7 application, under Remarks: "Called me a liar, twice, in front of my secretary," signed "Mike 11-7-94" (G.C. Exhs. 4, 48, emphasis added). Undoubtedly if McCusker had written this on the application on November 7, the Company would have included the offensive language in its

position statement 3 weeks later. (I consider this apparently obvious "doctoring" of evidence--inserting the "liar" remarks on the application before trial--to be a serious abuse of the Board's processes.)

At the trial, McCusker gave conflicting accounts of his November 7 conversation with Roy Rife. On the first day of trial he testified (Tr. 35): "I don't know if [Roy Rife] used the word 'liar,' but he did say "lie," and he was referring to me, yes." Later, when called as a defense witness, McCusker testified that when he was telling Roy Rife "I don't need anybody at FANX right now," Roy Rife twice told him (Tr. 1196-1197): "That's a lie."

On cross-examination McCusker testified, "I didn't know for sure. It just seemed like we weren't" hiring fitters. (Emphasis added.) When asked how many times Roy Rife said "That's a lie," McCusker answered: "I don't remember for sure. I think two, three. It may have only been one. . . . Okay, two, possibly three." (Tr. 1415-1416, emphasis added.) He next testified (Tr. 1416-1417):

Q. What did you . . . write on this application about this?

A. I think I wrote--and this guy called me a liar, which he didn't really call me a liar. He said, that's a lie. But he was kind of burned up. I'm not going to hire Roy Rife unless one day we patch the fence. I mean, I'm not carrying this around. I'm willing to drop it. [Emphasis added.]

Roy Rife vigorously denied ever using the word "liar" or the word "lie" in the conversation (Tr. 161). Goldbeck did not corroborate McCusker's claim that Roy Rife did. I discredit, as a fabrication, McCusker's belated claim that Roy Rife twice

called him a liar, or that Roy Rife once, twice, or three times said, "That's a lie."

I reject the Company's arguments in its brief (at 38) that the testimony of insurance agent Radziewicz (a disinterested witness, that Goldbeck said there were no "union jobs" available to this union plumber) should not be credited and that Roy Rife "abruptly and loudly challenged Vice President McCusker as a liar in the middle of the Company's own reception area"--ignoring McCusker's belated admission that "he didn't really call me a liar."

RONALD RUTKOWSKI. When apprentice Rutkowski, who was injured July 22 at FANX, was released by the doctor on December 12 to return to work, the Company had a serious shortage of fitters at FANX. As found above, the FANX contractor complained

On December 14 (p. 23), "Yet again your manpower has dramatically fallen off. The negative impact of this was clearly seen at today's scheduling meeting . . . especially on Floors 3, 7, 4 and 5. I cannot urge you enough to cure this problem permanently."

Rutkowski called Goldbeck on December 12 and asked to speak to Bolyard. After putting him on hold, she said that Bolyard was unavailable to talk. Rutkowski asked to speak to McCusker. She put him on hold again and reported that McCusker was also unavailable to speak with him and said he should talk with Forsythe. He asked to do so and she said he was not in. He asked her to "please leave a message with [Forsythe] that I am ready to return to work." (Tr. 628-629.)

Although the Company hired three helpers that week (Gregory Horn, Christopher Carter, and Edward Kelley) and fitter Thomas Geris the follow Monday, December 19), Forsythe failed to reinstate Rutkowski, whose personnel record bears the notation: "Came off of medical leave (w.c.) 12-13-94. We told him to reapply--We were not hiring at that time [emphasis added]" (Tr. 629; G.C. Exh. 31; R. Exh. 11).

On December 19 Local 536 obtained an apprentice position for Rutkowski at Grinnell. On December 21 Forsythe left a message on Rutkowski's answering machine to give him a call at the office about work. The evidence does not reveal whether by that time the Company had learned that Rutkowski had already found work at a union company, whether it would have reinstated him--after stating on his personnel record that "We were not hiring at that time"-- or whether it would have offered him reinstatement as a $ 6 to $ 10 helper. (Under its "new contract," the Company no longer had an apprentices classification.) I discredit Forsythe's claim that he left the message on Rutkowski's answering machine "the following day" after receiving the released-by-doctor message. (Tr. 629-630, 632, 1233; G.C. Exh. 13.)

4. Company defenses

Superintendent Forsythe denied selecting applicants "based on whether or not they had listed union companies" on their applications (Tr. 1234), even though all eight of the union applicants he refused to hire had shown prior employment by Grinnell on their applications.

Concerning how it happened that he was employing only nonmembers of Local 536, Forsythe claimed "It's just the way

it worked out" and it was "just a coincidence" (Tr. 1270-1271). His testimony, however, reveals how this happened.

The Company was requiring all applicants to submit a written application disclosing where they had been working. The Company merely filed the applications submitted by former employees of Grinnell and other union companies without hiring any of them.

Forsythe explained that an application "goes into a file" if he does not need a fitter. When asked if he "would look at those again?" he answered, "It's possible"--conceding that doing so was not his regular practice. Regarding how he decided which applicants to interview, he testified "I would probably take the most recent [applications] that were there, somebody had just walked in that day" or look at applications he just got out of his mailbox. (Tr. 1265.)

Although experience was a factor in his decision, Forsythe testified (Tr. 1268-1269):

Well, a referral gives me more to work with than just an application that somebody drops off on my desk, because that's somebody else that works for you recommending somebody else. And most people won't refer anybody and say they're a good mechanic that you're going to take on, because it would actually kind of make them look bad later for referring them. [Emphasis added.]

This testimony reveals how he was actually selecting new employees. Rather than considering the filed applications submitted by union journeymen, he relied on the recommendations of nonunion employees he had already hired, or he hired nonunion walk-ins. As examples, he hired the $ 12

fitter William Hax, who was "extremely slow" and "in no way journeyman material" on the recommendation of the $ 13 fitter Stacy Gillis (who was installing about 10 or 12 heads a day, instead of the normal 30 or more) and hired the $ 12 "walk-in" fitter Harry Jordan, who McCusker admitted was "just a high-priced helper." (Tr. 537-539, 1236-1249, 1282, 1415; R. Exhs. 11, 12.)

Similarly McCusker testified: "If someone's recommended, I'll take them on" (Tr. 80).

Although McCusker admitted that "it's almost a sure thing that union members know what they're doing because they've been through a [5-year NFSA] apprenticeship program" (Tr. 849), Forsythe claimed that union affiliation "doesn't represent anything. I mean, sprinkler fitters are sprinkler fitter to me" (Tr. 1270). Forsythe had never been a union member (Tr. 120). Regarding his refusal to reinstate Local 536 member Kraeuter, Forsythe claimed, "I recall him calling and saying he was released from . . . the doctor. And then I said I didn't have anything for him at the time. That's about all I recall." (Tr. 1269.) As indicated, Forsythe by his demeanor on the stand appeared willing to give any testimony that might support the Company's cause.

In preparation for his testimony as a defense witness, Forsythe marked on a list of the new employees those who were "U" (union)--evidently to prove that he was not discriminating against the members of Locals 536 and 669 who were seeking employment or reinstatement, but at the same time indicating his attention to the union affiliation of employees he hired. Although Forsythe claimed that they were "union sprinkler fitters," there is no evidence that any of them belong to a sprinkler fitters local. The Company finally took the

position that the exhibit "does not intend to show that they were hiring members of" Local 536 or Local 669. (Tr. 1235-1237, 1240, 1246-1249; R. Exh. 11.)

I find that the evidence is clear that the Company was not hiring the "U" fitters on the list as union members of the Locals, but was hiring them as nonunion (nonmember) employees in its nonunion operation.

Despite all the evidence to the contrary, the Company contends in its brief (at 29-30) that the allegations of refusals to hire or consider members of the Locals for employment are, for the most part, "simply based on surmise [emphasis added] that individuals whose applications showed past employment at some time by unionized companies were systematically weeded out by superintendent Forsythe in order to deprive Local 536 and Local 669 of supporters on the [company] payroll."

5. Concluding findings

As found, the Company engaged in bad-faith bargaining with a strategy of provoking Locals 536 and 537 to strike, enabling it to hire permanent nonunion replacements and operate nonunion. It then declared impasse in its negotiations with both Locals and implemented its nonunion proposal as the "new contract." Although neither Local called a strike, the Company began operating nonunion, excluding the Locals from playing any role in representing the employees.

While operating nonunion, the Company hired only nonmembers of the Locals. Although its newspaper ads for experienced employees failed to produce a sufficient number of qualified nonunion applicants for vacated fitter jobs and the additional sprinkler fitters needed, it failed to call the union

business agents, as before, for journeyman fitters. It instead hired mostly less-qualified fitters and foremen (as well as untrained helpers) and operated shorthanded, despite complaints of "manpower shortages," "lack of available manpower," "urgent need of additional manpower," and "insufficient manpower."

All eight of the union applicants who applied (four members of Local 536 and four members of Local 669 members) revealed their union membership by showing Grinnell as a former employer on their written applications. All four of the injured Local 536 members whom the Company refused to reinstate upon their recovery were known to be union members because they (like the Grinnell employees) had been working under an NFSA agreement and Forsythe admitted knowledge of their union membership (Tr. 136).

The evidence shows that the Company merely filed the application submitted by each of the 12 union members without employing any of them to fill available jobs, while hiring less-qualified nonmember sprinkler fitters and foremen. The evidence also shows, as its FANX foreman Charles Reid revealed upon redirect examination by the Company's counsel (Tr. 1186), the weekend overtime work (which was assigned exclusively to nonunion employees on the weekend before Labor Day, as discussed later) "pretty much turned into every weekend" (because of the shortage of experienced fitters, as Reid conceded Tr. 1180).

The evidence therefore shows that the Company, while operating nonunion and hiring only nonmembers of the Locals, was operating shorthanded in the absence of a sufficient number of qualified nonunion sprinkler fitters and was

excluding the Locals from playing any role in representing the employees.

Particularly in view of this evidence and the Company's undisputed knowledge of the union membership of the union applicants, I find that the General Counsel has made a prima facie showing that a motivating factor in the Company's refusal to hire the eight journeyman members of Locals 536 and 669 and to reinstated the four journeyman members of Local 536 was their union membership. *Wright Line*, 251 N.L.R.B. 1083 (1983). I also find that the Company has failed to meet its burden of proof that it would have refused to hire and reinstate them in the absence of their union membership.

Accordingly I find that since the dates indicated, the Company discriminatorily refused to hire Local 536 members Scott Dyott (8/31/94), Melvin Haynes (8/29/94), David Rehbein (8/30/94), and Steven Stricker (8/30/94) and Local 669 members Laurence Davidson (8/18/94), Stephen Griffith (8/26/94), Edward Saunders (8/23/94), and James Spitzer (8/22/94) and to reinstate Local 536 members Frederick Kraeuter (8/29/94), Richard Newsome (9/7/94), Roy Rife (11/7/94), and Ronald Rutkowski (12/12/94) because of their union membership, in violation of Section 8(a)(3) and (1) of the Act.

F. Eliminating Union Members from Payroll

1. Discharges

a. Steven Bloodsworth, Joseph Brown, and Todd Hood.

Journeymen Steven Bloodsworth and Joseph Brown and apprentice Todd Hood were working at the Shot Tower job site

on Thursday, August 11, when President Bolyard personally went there and admittedly announced that the employees must report to the office and fill out new applications. He also told them to report to the FANX jobsite the next day if they wanted to continue working for the Company. (Tr. 150, 170-171, 221, 234, 257, 286.)

On Friday morning, August 12, Bloodsworth went directly to the office where, as he credibly testified, Superintendent Forsythe "said that I quit and that I couldn't be hired." Bloodsworth denied quitting and said he wanted to speak to Bolyard himself. When Bolyard came to the lobby to speak to him, Bolyard "told me that I quit and that he couldn't hire me today, and that I could fill out an application." Bloodsworth protested, "I did not quit" and asked, "Are you going to hire me?" Bolyard said, "No." (Tr. 254-256, 260, 264.)

Hood reported to work that Friday morning at FANX and went to the office with acting foreman Todd Rife. Forsythe similarly told Hood, "I heard you quit." Hood said, "There ain't no way I quit" and that he would like to see Bolyard. After he waited in the lobby with Rife about 10 minutes, Bolyard came out and told him, "You said no, [Brown] said no, [Bloodsworth] said no, and I haven't heard from [Shot Tower foreman] Bobby Grimm." Hood responded, "That's bull shit. I didn't quit." Rife spoke up and told Bolyard, "I can't believe that the man had quit. He showed up on time for work, with his tools." Nevertheless, as Hood credibly testified, Bolyard told him that if he wanted to fill out an application he was "more than welcome to do so. But there was no positions available at this time [emphasis added]." Hood filled out an application, but the Company never contacted him. (Tr. 235-239, 245-247, 249, 286, 501, 504-506, 512-513; G.C. Exh. 41 p. 5).

Brown had car trouble that Friday morning on the way to work at FANX. He called in and said to tell Bolyard what happened and that he was prepared to go to work Monday. Bolyard called Brown's home and left a message on his telephone answering machine that because "you quit work Thursday, right now I have no work available at this particular time [emphasis added]. But later on in the week, we might have some work. You're welcome to come over, fill out an application for work." Brown submitted an application, but was never contacted. (Tr. 222-225; G.C. Exh. 41 p. 14.) Bolyard claimed he did not recall calling Brown's home (Tr. 99). Brown still had the message on his answering machine (Tr. 229).

Bolyard testified, "I believe all [three of the employees quit], but I wouldn't swear to it" (Tr. 96). To the contrary, employees who were present when Bolyard came to Shot Tower on Thursday, August 11, credibly testified that the employees did not say they were quitting. (Tr. 151, 224, 256, 286). Bloodsworth recalled that he told Bolyard he could not make a decision at that time without contacting his union official and that Bolyard said they could decide over the weekend (Tr. 258). Brown recalled telling Bolyard, "I have no problem" in reporting to FANX the next day, "I'd just like to touch base with my business agent" (Tr. 222). Hood, a 5th year apprentice, knew that an apprentice is not permitted to quit (Tr. 231-232).

I find that the employees did not quit. Moreover, even if Bolyard was under the impression that the three employees quit, he revealed the Company's discriminatory motivation by falsely telling Brown and Hood on August 12 that there was no work available.

The Company needed more employees on the large FANX project, as Bolyard acknowledged by removing the three

employees and the foreman from the uncompleted Shot Tower project and telling them to report to FANX the next day if they wanted to continue working for the Company. Although the Company was behind schedule at FANX, Bolyard was forbidding the three employees to work there, as assigned the day before. No new employees had been hired. The Company became further behind schedule, as demonstrated by the multiple complaints from the FANX general contractor.

I find that the Company was using its purported belief that the union members had quit as a pretext for eliminating them from the payroll.

I therefore find that the Company discriminatorily discharged Steven Bloodsworth, Joseph Brown, and Todd Hood on August 12 because of their union membership, violating Section 8(a)(3) and (1).

b. James Birmingham, Howard Crosby, and Stephen Paca.

(1) Unlawful motivation

About a month later on September 6 the Company eliminated three other union members from the payroll. Without any advance notice, complaint, or warning, Forsythe told journeymen James Birmingham and Stephen Paca and apprentice Howard Crosby that they were discharged for lack of productivity. (Tr. 340, 347-349, 352, 383-384, 389, 401-404, 428, 431, 438, 1117; G.C. Exh. 45 p. 24.)

The three participants in the discharges were Vice President McCusker (who gave much fabricated testimony in the Company's defense for not hiring and reinstating union members), Superintendent Forsythe (who was hired from a

nonunion company in April, while the Company was engaged in bad-faith bargaining), and foreman Charles Reid (a nonunion fitter whom Forsythe had known "at least nine years" and whom Forsythe told "they were looking for replacement employees" (Tr. 119-120, 1135, 1288).

They gave conflicting testimony about the September 6 discharges. McCusker claimed, "I don't remember exactly" why the three employees were discharged and claimed that Reid decided to discharge them (Tr. 14-15). President Bolyard positively testified "No," Reid does not have "the authority to hire or fire employees" (Tr. 105). Forsythe stated in his pretrial affidavit that he and McCusker met on September 5 (Labor Day) and decided to terminate the employees on September 6 at the end of the day (G.C. Exh. 45 p. 54).

As a defense witness, Forsythe testified unequivocally (Tr. 1221) "I did" when asked "who made the decision to dismiss them?" To the contrary, Forsythe told the employees on September 6 that McCusker was the one who was firing them (Tr. 340, 349.) Reid, in turn, testified that he recommended their discharge to Forsythe because Production was dropped and we are falling behind rapidly," but heard nothing from Forsythe for a "week, week and a half" until Forsythe came to the job and "asked me to come with him [and a security guard and said] that he was going to terminate their employment" (Tr. 1115-1116).

The evidence is undisputed that the only reason Forsythe gave on September 6 for discharging the three union members was their "lack of productivity" and that the Company had not previously mentioned or complained about their production (Tr. 340, 389, 401, 431).

In his pretrial affidavit Forsythe stated that Paca, Birmingham, and Crosby "were assigned to do the installation on the 6th floor" and claimed that "By September 2, 1994, the floor had fallen way behind schedule, and it was obvious that there was no hope for production" from the three employees (G.C. Exh. 45 pp. 53-54). When discharging the employees, as Birmingham testified, Forsythe said that FANX had sent letters to the Company stating specifically that "the 6th floor was behind on production" and "Specifically, myself, Howard Crosby and Steve Paca were behind on production" (Tr. 384). At the trial Forsythe claimed, "Everything was running pretty smoothly other than the sixth floor" (Tr. 1222).

Credible evidence presents a far different picture. The Company was operating shorthanded on the entire project. The FANX general contractor's written complaints, discussed above, include the following latest complaints (G.C. Exh. 32):

On August 25 (p. 9), that the "ceiling grid is scheduled to start @ Blocks 3 of Floors 2 & 6. Your work is seriously behind in these blocks. Please take immediate corrective action to avoid delay to following trades."

On August 30 (p. 10), only 13 men on the job. The grid is scheduled to start on floors 2 & 6 (block 3), but your work is only 10% at 2d floor and 0% at 6th floor. On 7th floor, no pipe on site, but you should be 100% at block 1 & 50% at block 2. On 3d floor, no pipe on site, but you should be 50% complete at block 1. "PLEASE CURE THESE PROBLEMS."

These subpoenaed documents, which the Company failed to produce (Tr. 385), did not single out the sixth floor and did not make any reference to Birmingham, Crosby, and Paca.

Crosby had not worked on the sixth floor until the week of August 29 (the week before the discharges). He had been working on the second floor until August 17, when Forsythe sent him on a special assignment in Garrisonville, Virginia (about 90 miles from his home). After working there 4 days, he returned on Wednesday, August 24, to the second floor where he worked the remainder of the week. Birmingham and Paca were working alone on the sixth floor. (Tr. 334-336, 339, 518; G.C. Exh. 86.)

Foreman Reid's log book shows that after the Company first assigned Crosby on Monday, August 29, to work with Birmingham and Paca on the sixth floor, it assigned Crosby that Tuesday to work on both the second and sixth floors. On Thursday it assigned the sixth-floor crew to "unloading 7th floor." On Friday, September 2, Paca was on an excused absence. (Tr. 1150; G.C. Exh. 86 pp. 5-10.) Thus, Crosby worked only 2 full days (Monday and Wednesday of that week) on the sixth floor with Birmingham and Paca before the three union employees were discharged on September 6.

I note that by assigning the sixth-floor employees to unload pipe on Thursday, September 1, the Company was disregarding the August 30 FANX complaint, expressing the urgency of the Company's completing its scheduled work on the sixth, as well as the second, floor for the scheduled grid work to start. Reid conceded that "If the area is hot," where "the grid man is right behind you," you "want to try and keep that running" and pull men from another area where you can spare them. That Thursday the Company did just the opposite. Instead of pulling men from another area (or hiring union applicants to speed up the sixth-floor work), it stopped the work on the sixth floor and assigned the crew to unloading work on another floor. (Tr. 1185; G.C. Exh. 86 pp. 4-5.)

Meanwhile, having received FANX's August 25 complaint (that the ceiling grill was scheduled to start at block 3 on the second and sixth floors, but "Your work is seriously behind in these blocks" and "Please take immediate corrective action to avoid delay to following trades"), the Company expanded the second-floor crew the early part of the next week.

Thus on Monday, August 29, it hired six new nonunion fitters and assigned four of them to work at FANX on the second floor. Two of the new employees were journeymen Joseph Edelen and Keith Hamilton. (They lived in southern Maryland and the Company hired them "with the Patuxent River Naval [Air Station] job [in southern Maryland] specifically in mind." Paying Edelen $ 17 an hour and Hamilton a premium rate of $ 20 an hour--above the $ 10 to $ 17 journeyman scale offered the Locals in negotiations--it assigned them to work temporarily at FANX in the Baltimore area, far from their homes, instead of hiring union members in that area). The other two new employees assigned to the second floor were a $ 15 fitter Daniel Green and a $ 13 fitter Stacy Gillis. (Tr. 1317-1318; G.C. Exh. 86 pp. 4, 5; R. Exhs. 11, 12.)

The assignment of these four new employees increased the size of the second-floor crew from three employees on Friday, August 26, to six employees on Monday, August 29. Gillis worked part of that Monday in another area. (G.C. Exh. 86 pp. 4, 5.)

On Tuesday, August 30, the Company assigned six nonunion employees (Joseph Edelen, Stacy Gillis, Daniel Green, Keith Hamilton, the $ 18 foreman John Parks, and the $ 8 helper Joseph Parks) to work on the second floor. Evidently it was when John and Joseph Parks "got called to another job" after

working there 2 hours that the Company pulled union member Crosby from the sixth floor and assigned him to work with the remaining four nonunion employees on the second floor. The second-floor crew was not required to interrupt their work to unload pipe on another floor that week, as was the sixth-floor crew. (Tr. 1151-1152, G.C. Exh. 86 pp. 4, 5; R. Exhs. 11, 12)

In contrast, the size of the sixth-floor crew remained at two employees (Birmingham and Paca) until Monday, August 29, when the Company first assigned Crosby to work with them. It assigned union member Ronald O'Connor to work there 6 hours that Monday (from another job, where his tools had been stolen, Tr. 303-305) and apprentice Stefan Buitron the remainder of the week, increasing the size of the crew to a maximum of four employees that week. (G.C. Exh. 86 pp. 1-11.) On Tuesday, September 6, the date it discharged the three employees, it reassigned Buitron to the second floor, leaving the three employees working alone that day on the sixth floor (Tr. 338, 527).

I find that Reid's motivation for recommending the discharge of the three employees related not to their productivity, but to their union membership. This was revealed at the trial by his claim (not mentioned at the time of the discharges) that "their attitude was very bad," that they (as union members working in what was then a nonunion operation) were "disgruntled workers" who told him "they could not stand Mr. McCusker or Allen Bolyard or anything to do with them" (Tr. 1110).

Forsythe, as well, revealed that the discharges related to the employees' union membership. On September 6, at the end of the day after he summarily discharged the three union members, he spoke in the parking lot to Todd Rife and Stefan Buitron, who were the only two remaining union members on

the entire FANX project. He warned them that "as long as our production kept up, [we] didn't have anything to be worried about. But if the production level fell, we would be fired also [emphasis added]." (Tr. 556-557, 573-574, 743-744; G.C. Exh. 86 p. 12.) As indicated, Buitron had worked on the sixth floor 4 days the week before.

Rife, who was the acting foreman at FANX from August 11 until August 23 when foreman Reid was hired, credibly testified that the three employees worked at normal speed and "did a good day's work" (Tr. 526-528).

Birmingham, who had earlier "filled in" as foreman at FANX (Tr. 359), talked after his discharge with the general contractor's acting superintendent, who told him that a letter had been sent stating that "the whole job was behind schedule and not any specific floor" and not naming anybody specifically (Tr. 403-404). Birmingham called McCusker and asked (Tr. 390):

why I was being terminated, And he told me I was terminated for lack of production.

And I just told him I couldn't believe that after all the years that I had worked for [the Company] and all the good work I'd put in for him, that they were terminating me for lack of production.

I [told him about] my qualifications as a journeyman. . . . That I topped out of my apprenticeship at the top of my class. . . .

I asked him . . . how he could hire two $ 10 an hour helpers [a $ 8.50 helper Brian Gordon and a $ 10 helper Ronald Hales,

who began working on the second floor that morning] that had no knowledge of the trade. And on the same day, fire three guys that had been through five years of training and amongst them had more than 30 years worth of knowledge in the trade.

And he said it was because they were cheaper. [Emphasis added.]

Work on the sixth, as well as the second, floor remained behind schedule. The only new employees hired before the next written complaint from FANX were an $ 8 helper David Steward on September 7 and the "extremely slow" $ 12 fitter William Hax on September 12 (R. Exhs. 11, 12). As discussed above, the general contractor complained (G.C. Exh. 32):

On September 16 (p. 12), that the Company "is still not meeting the schedule requirements in many areas on this project. . . . it appears to stem directly from [the Company's] labor problems and manpower shortages." As we discussed by telephone today, "my staff had been informed by [the Company's] employees that pre-punch work at Block 1 of second and sixth floors (punch list scheduled for September 19, 1994) could not be done due to lack of available manpower [emphasis added]."

The evidence is clear that when the Company assigned the three union members on August 29 to work together on the sixth floor, it knew the work there was far behind schedule. It made sure that they could not bring the work up to schedule, by not assigning a sufficient number of employees to that floor and by requiring them on Thursday of that week to perform unloading duties on another floor. Then on September 6 it accused them of low productivity for the work being behind schedule on the sixth floor.

Meanwhile the Company was hiring only nonmembers of the Locals, operating shorthanded in the absence of a sufficient number of qualified nonunion sprinkler fitters.

Under these circumstances and in view of (a) Forsythe's false claim that FANX had complained specifically about the three employees being "behind on production," (b) his discharge warning to the two remaining union members, (c) McCusker's explanation that the newly hired nonunion helpers were "cheaper," and (d) the Company's conflicting testimony about who made the decision to discharge the employees, I find that the General Counsel has made a prima facie showing that a motivating factor in the Company's decision to discharge Birmingham, Crosby, and Paca was their union membership or activity.

(2) Unfounded defenses

In its September 15 position statement (G.C. Exh. 45 p. 7) the Company contended that the three employees "were terminated because they engaged in a concerted work slowdown after implementation" of its partial-page proposal on August 11 (emphasis added). It ignored the fact that they were assigned to work together for the first time on August 29--over 2 weeks after it implemented the "new contract"--and the fact that they had never been accused of a slowdown or low production.

In his pretrial affidavit attached to the position statement, McCusker claimed (p. 24):

On September 6, 1994, we terminated the employment of Steve Paca, James Birmingham and Howard Crosby for their complete lack of productivity since implementation. In that

time, their installation production plummeted by fifty percent (50%) compared to previously and with that of other workers. [Emphasis added.]

At the trial McCusker admitted that the Company had no records of any decline in the three employees' production (Tr. 20). Foreman Reid conceded that he kept no records of "the productivity of employees" (Tr. 1180). Forsythe testified (Tr. 1219) that he would say it was "late August or early September" when he first became aware of "any problems or concerns" about their "performance or production."

I reject, as another of his fabrications, McCusker's claim in his pretrial affidavit that since the Company's implementation of the partial-page proposal on August 11, the three employees' production "plummeted" 50 percent.

At the trial foreman Reid gave the Company's belated defenses, never before raised. He claimed (Tr. 1111-1113):

A. [The three employees] would be working on one floor and they would be walking around talking to other people on the other floors. Totally out of their work area.

Q. [BY MR. DUBE] What floor was it that they were working on?

A. I believe at that time it was the sixth floor.

. . . .

Q. And you said you started there on or about the 22nd or 23rd of August.

A. Yes, I believe.

Q. After what period of time working at that jobsite did you reach the conclusion that these men were working very slow?

A. It only took a matter of days. It was very obvious.

. . . .

Q. Okay. Did you go to the sixth floor each day?

A. Every day, at different times during the day.

Thus Reid was implying that the three union employees were working together on the sixth floor since he became the foreman on January 23. He was ignoring his own record in his log book, showing that Birmingham and Paca were working alone on the sixth floor until January 29, when the Company first assigned Crosby to work with them.

On cross-examination Reid conceded that the three employees received no written warning and that he never asked McCusker to meet with them in a disciplinary meeting. He then added further accusations, revealing that he had joined in the Company's preparation for "getting them off" the job, testifying (Tr. 1115-1116, 1155):

I pointed out the problem [to Forsythe a week or week and a half before September 6] and said we had to do as suggested, getting them off this job because they were ruining the job and doing everything in their power to hamper the progress of the job [emphasis added]."

Reid was evidently referring to an entry he made in his log book on August 31, the second time the three employees worked a full day together. It read: "6th floor men hopeless." (G.C. Exh. 86 p. 8.) He was evidently referring to the three employees, although union member Buitron was working on the sixth floor with them.

When asked for details about how they were hampering the progress of the job, he claimed (Tr. 1155-1156):

They were . . . kind of making life hard on the other employees. Very hard on them. . . . I heard all the remarks. . . the ratting and the name-calling and stuff like that. . . . Standing around talking to themselves, talking to other trades, wandering around the building, being in places they had no reason to be in. Just generally not doing their job. . . . I would say starting basically the second day I was there. [Emphasis added.]

I reject this belated defense, not mentioned at the time of the discharges, that the three employees were hampering the progress of the job. I note that on Reid's second day there (Thursday, August 25), Crosby was working on the second floor, not with Birmingham and Paca on the sixth floor.

I find that the Company has failed to meet its burden of proof that it would have discharged the three employees in the absence of their union membership or activity. I therefore find that it discriminatorily discharged James Birmingham, Howard Crosby, and Stephen Paca on September 6 to eliminate these union members from the payroll, violating Section 8(a)(3) and (1) of the Act.

(3) Required remedy

I reject the Company's contention in its brief (at 36) that even if the Board were to consider the discharges illegal, the employees post-discharge conduct "forfeited any right to reinstatement or backpay."

Between 3 and 3:30 p.m. on Tuesday, September 6, after they had been required to work alone that day, the employees became most upset and angry when Forsythe approached them on the sixth floor, accompanied by Reid and an armed security guard, and summarily discharge them for "lack of productivity." They protested that there were more men on the second floor, that they had been taken off the job to unload material the Thursday before, and that two new men had been hired to work on the second floor that morning. But Forsythe explained that they would have to speak to McCusker, because he was the one that was firing them. (Tr. 338-341, 351-352, 383-384, 428-429, 437-438, 1229.)

Forsythe testified that the employees became "very irate" and "there was a whole lot of words flying back and forth," that "were off hand," such as "something about slapping me in the back of the head," but "I really don't recall who was saying what at that time"--indicating that he did not take the angry statements seriously (Tr. 1230).

There were no threatening gestures toward Forsythe and nothing in the sudden outburst of anger to place him in fear of actual harm. The security guard said "everybody ought to calm down" and Birmingham apologized to the guard for raising his voice. Forsythe walked away and the guard escorted the employees from the building. (Tr. 385-388, 391, 398-400, 429-436, 449.)

I find that under the circumstances the outburst of anger in indignation, provoked by the Company's unlawful conduct, is an insufficient cause for depriving the employees of remedial relief.

c. Todd Rife and Warre Bentert

The Company later discharged two additional Local 536 members, Todd Rife and Warren Bentert. As found, Rife had been the acting foreman at FANX from August 11 to August 23. Bentert had been employed since 1980, usually assigned as foreman (Tr. 641). Although I find that the Company discriminatorily discharged Rife because of his union membership and activity, I find that it would have discharge Bentert even if he had not been a member.

TODD RIFE. Foreman Reid played a principal role in the elimination of Local 536 member Rife from the payroll, as he did in the discharge of union members Birmingham, Crosby, and Paca. Since those three union members were discharged, Todd Rife had talked with nonunion employees at FANX about the NLRB charges and the possibility that the Company would have to pay backpay (Tr. 536-537, 540). When Reid was asked at the trial if Rife talked "to his fellow employees about wages or benefits or working conditions" in a way Reid thought was a problem, Reid answered, "He was always talking about that" (Tr. 1158).

Like Reid's previous recommendation that Birmingham, Crosby, and Paca be discharged for being "disgruntled workers" with a bad "attitude" as well as slow producers, Reid recommended that Rife be discharged, claiming that he was uncooperative and "not working up to [his] capacity" (Tr. 562-563, 1126-1128).

On December 30 Reid told Rife that McCusker wanted him in the office. There McCusker asked Rife about Reid's complaints. After Rife related all the extra work he was performing at the FANX job for Reid, McCusker told Rife he was not aware of the extra work and said he just wanted to give Rife "a chance to come in and give my side of the story." He told Rife "to go back to FANX and have a good day"--without giving any indication that this was a disciplinary meeting or a warning. (Tr. 529-534.)

On Thursday, January 19, 1995, both Rife and Bentert told Reid that they were "concerned about the paychecks bouncing" (as some of the checks had) and that they were leaving work at 12 noon "to get our paychecks cashed at the bank they were drawn on. This meant that they would miss 2 hours of work, from 12:30 (after the 30-minute nonpaid lunch break) until 2:30 p.m. Reid responded that he understood and that he was concerned about his paycheck also. (Tr. 541-544, 662-663.)

The following Thursday, January 26, 1995, Ronald O'Connor (the only Local 536 member remaining on the payroll at the time of trial), overheard Rife and Bentert telling Reid that they were leaving at noon and Reid saying "Fine" (Tr. 313). Bentert also credibly testified that both he and Rife told Reid that day that they were leaving at noon (Tr. 665-666).

Sometime that same day, January 26, Reid wrote in his log book that these three union members, Todd Rife, Bentert, and O'Connor, "did next to nothing but standing around & talking. TODD WAS READING THE NEWSPAPER." (Tr. 313; G.C. Exh. 87 pp. 7, 10). O'Connor, who Reid testified "didn't really have too much to say" about wages, benefits, or conditions, was not reprimanded.

Although Reid emphasized in his log entry that Rife was reading the newspaper, he admitted that he did not see Rife doing so. He claimed that somebody else told him and claimed that Keith Hamilton and Joseph Edelen (two of the nonunion employees on the job) told him "flat out [the three union fitters] didn't do nothing." (Tr. 1163-1165.)

I infer that Reid wrote the log entry in cooperation with the Company's preparation for discharging Rife.

The next morning, January 27, 1995, Forsythe handed Rife a discharge notice, stating that Rife "left site early [on January 26] without discussion or authorization from site supervisor." The notice specified five violations: "Insubordination," "Leaving work station," "Misconduct," "Low Output," and "Undependable" and stated "Previous Warning" on "12/30/94"--falsely indicating that McCusker gave him a warning in the December 30 meeting (Tr. 546; G.C. Exh. 36.) Later that morning Bentert informed Forsythe that "Todd had made Chuck Reid aware that he was going to" leave early. Forsythe said, "Well, that's not the only thing they fired Todd for." (Tr. 666-667).

Forsythe testified that "what Todd Rife was telling other employees about the Labor Board and the Union was very bad for morale and productivity" and that this "played a part" in his decision to discharge Rife (Tr. 1301).

McCusker admitted that he was consulted or involved in the decision. After admitting that he had been told that Rife was talking to other employees about NLRB charges, he testified (Tr. 1405-1406):

Q. [BY MR. DUBE] Were you consulted or involved at the time that he was discharged?

A. Yes.

Q. Who did you talk to at that time?

A. Dewey [Forsythe], maybe Chuck [Reid].

Q. What was the discussion about with Dewey or Chuck in terms of the discharge of Mr. Rife that you heard or were involved in? What was the reason that he was being considered for discharge?

A. The reason that I heard about--that I insisted on hearing about, I might add, was that he's just not working. He doesn't care about his job, and that he keeps quitting early like [Bentert] does after being told many times and that upset me, about Todd Rife. Apparently, he was a good man. And he came in and talked to me [on December 30]. I had no problem with Todd, except that I just kept getting complaints that he was quitting work early and after a while, his attitude went to hell. [Emphasis added.]

To the contrary, Rife did not keep leaving work early "after being told many time." He left work early only once before and had properly informing foreman Reid both times before leaving. I reject this explanation as another of McCusker's fabricated defenses.

I reject the Company's contention in its brief (at 41) that even if the General Counsel had established a prima facie case of a violation of Section 8(a)(3)," the Company has carried its burden to show that the same action would have been taken

regardless" of Rife's union activity. I find that the Company seized upon Rife's twice leaving work early as a pretext for eliminating from the payroll another union member who was opposed to the Company's unlawful conduct in imposing nonunion working conditions on the employees.

I therefore find that the Company unlawfully discharged Todd Rife on January 27, 1995, because of his union membership or activity, violating Section 8(a)(3) and (1).

WARREN BENTERT. Forsythe had told Bentert to stop "griping about my pay in front of the other guys" (Tr. 654). When he learned that some of the Company's checks had bounced, Bentert told nonunion employees that "had it been a union job we would have been bonded" (Tr. 673). In addition, Bentert had refused McMusker's assignment of a job in southern Maryland because it was outside Local 635's jurisdiction, which the Company was no longer recognizing (Tr. 654-657).

Like Todd Rife, Bentert left work at noon both on January 19 and 26, 1995. Bentert left early again on January 27 because his check had not arrived in the mail on January 26. Bentert admitted that Forsythe told him afterward that he "couldn't have me leaving early because everybody else would want to." Bentert further admitted that on February 10, when he told Reid he was leaving again to cash his paycheck, Reid instructed him to first call the office. Bentert refused and persisted in leaving early without calling the office for permission. (Tr. 665-666, 668-671, 674-677, 1122-1124.)

On February 14, 1995, the Company suspended Bentert 4 days for insubordination and on February 20 McCusker

converted the suspension to a discharge (Tr. 677-678, 682; G.C. Exh. 38).

Even if the General Counsel has made a prima facie showing that a motivating factor in the Company's decision to discharge Bentert was his union membership and activity, I agree with the Company's contention in its brief (at 40-41) that in view of the evidence of Bentert's "defiant insistence on leaving work to cash" his paycheck, the Company has carried its burden of proof that it would have discharged Bentert "regardless of any union activity."

I therefore find that the Company did not violate Section 8(a)(3) and (1) by suspending Warren Bentert on February 14, 1995, and discharging him on February 20, 1995.

2. Constructive discharges

a. Applicable precedents

In *RCR Sportswear*, 312 N.L.R.B. 513 (1993), one of the owners informed the employees that the business was closing and that they had the option of signing for unemployment or working for the "new company" with the same wages, but no benefits. When asked how the employees knew the union contract would not be applied, the owner testified, "No benefits means no contract." The Board found that the employer constructively discharged the employees who quit, citing *Control Services*, 303 N.L.R.B. 481, 485 (1991), *enf'd. mem.* 975 F.2d 1551 (3d Cir. 1992) and holding:

> Here, employees were confronted with the choice of resigning or working under conditions

> that were established in derogation of their statutory rights.

In *Control Services*, after expiration of the union contract, the employer implemented its final offer, reducing wages and hours and eliminating the health insurance without reaching a valid impasse in bargaining with the union. The Board found that the employer constructively discharged nine employees because they "quit after being confronted with a choice between resignation or continued employment on relinquishment of statutory rights. . . . the employees were required to work under conditions that were established in derogation of the right to bargain [emphasis added]."

In *Pillsbury Chemical Co.*, 317 N.L.R.B. 261, 265-266 (1995) the employer on December 9, 1988 discriminatorily demoted employee Douglas Evanoff, cutting his pay from $ 9.75 to $ 6.44 an hour. Although he continued working at the lower wage over 6 weeks before finding another job and resigning on January 20, 1989, the Board found that he was constructively discharged.

These and earlier similar precedents are clearly applicable.

As found, the Company engaged in bad-faith bargaining with no intention of even seeking an agreement with either Local. Instead, its strategy was to provoke the Locals to strike, enabling it to hire permanent nonunion replacements. Then on August 11, in the absence of valid impasse, it imposed its partial-page proposal as the "new contract" on the employees in both bargaining units "in derogation of the right to bargain." This "confronted [the employees] with the choice of resigning or working under conditions that were established in derogation of their statutory rights."

The Company's "new contract" not only reduced wages and eliminated union benefits, it also made other major changes in the working conditions, nullified the separate bargaining units, and excluded both Locals from playing any role in representing the employees.

Faced with the nonunion wages and working conditions, no contractual health benefits, and no representation by their bargaining representatives, some of the employees immediately resigned that week. Some of the others, because of a shortage of union jobs, endured the imposed conditions until they could find other employment, then resigned.

I reject the Company's contention in its brief (at 25) that there is "no evidence on the record in this case that the employer wanted union sprinkler fitters to quit, or that it was somehow singling them out because of their union activities."

b. Members of Local 536

ROBERT GRIMM was the Company's foreman at the Shot Tower subway project. President Bolyard told the employees there on August 11 that the Company and Local 536 had reached an impasse and that if they were coming to work the next day, they would work under the Company's partial-page proposal. Wanting to remain union. Grimm notified Goldbeck the next morning that he was not coming to work. He went to work at Reliance the next Monday. (Tr. 284-287, 291.)

EDWARD GNIP was a journeyman member of both Locals 536 and 669, working at FANX. Superintendent Forsythe told the journeymen there on August 11 that they would be making $ 10 to $ 17 an hour. In the office on August 12 Forsythe "went

over" the partial-page proposal with Gnip, explaining that the optional insurance would not take effect for 6 months and there would be no benefits. Gnip worked the remainder of the day at FANX, but went to work with union benefits the next Monday at Reliance. (Tr. 265-274, 277, 1400-1401.)

STEFAN BUITRON was working as an apprentice at the Winchester House. Forsythe told the employees there on August 11 that the partial-page proposal was the new contract. Buitron continued working until December 14, when his union medical and pension benefits were expiring. Particularly wanting the union medical insurance, he quit and went to work for a Local 536 employer. (Tr. 738-739, 745, 749-751.)

KELLY PREUETT, who became a journeyman in September, also continued working until December when his union medical benefits expired. On December 23 he informed Forsythe that he was quitting to take a better-paying job with benefits. (Tr. 755, 764-765.)

JIMMIE LOVE, a journeyman, particularly needed the union medical benefits for his family. He continued working beyond December, when the benefits expired, until he found a union job. On Friday, January 13, 1995, he quit and went to work at Grinnell. (Tr. 715-717.)

MICHAEL FORD, who became a journeyman in August, continued working until March 29, 1995. Although he lived in Belcamp, Maryland (northeast of Baltimore) and worked as a member of Local 536 in the Baltimore area, the Company assigned him in March to work at Dulles Airport (west of Washington, D.C.). He complained to Forsythe that driving that far was "killing my truck, not to mention not spending any time with the family." (Tr. 600-601, 609-611.)

On March 29 Ford complained to McCusker that this was work in the strike territory of Local 669 (which was involved in a labor dispute with Grinnell outside the Baltimore area). He stated he was not going to break a strike and asked for Baltimore work. When McCusker stated, "We are not a union shop [emphasis added]," Ford responded, "Well, I am a union worker" and that he would not cross into Local 669 territory. McCusker stated that Ford had a decision to make, to either work at Dulles or "look for work elsewhere." Ford said he would have to quit, which he did. (Tr. 611-613, 616-624, 1095; G.C. Exh. 31.)

Thus, the Company confronted Ford with the choice of resigning or working under conditions it established in derogation of the employees' statutory bargaining right, not only depriving him of representation by Local 536 and the union wages and benefits, but also requiring him to work in another Local's jurisdiction.

I find that on the dates indicated, the Company constructively discharged Robert Grimm (8/12/94), Edward Gnip (8/15/94), Stefan Buitron (12/14/94), Kelly Preuett (12/23/94), Jimmie Love (1/13/95), and Michael Ford (3/29/95), in violation of Section 8(a)(3) and (1).

c. Members of Local 669

RONALD MOYERS. Chief Engineer Barnhart, when giving journeyman Moyers his Monday assignment on Sunday night, August 14, said "he wasn't honoring our contract anymore with the Local 669" and that the Company "had their own contract drawn up for the employees that wanted to stay" (Tr. 877-878).

Wanting to work for a Local 669 contractor and to "keep my benefits and insurance and stuff for the family," Moyers continued working only until he had a union "job offer in hand." Then on September 14 he called Barnhart and resigned. The next day, when Forsythe called him, Moyers explained: "I just needed to go to a signatory contractor." Forsythe claimed that nobody said the Company was nonunion." Moyers responded, "Well, it seems to me that that's the case because . . . you've quit paying benefits and signatory wages." (Tr. 880-882.)

CLARENCE SAMPSON. Journeyman Sampson worked on August 15 and 16, after Bolyard told him the week before that "we will no longer be a member" of Local 669, "It is like a 20-year marriage, I have been with the Local. The marriage is over." (Tr. 1006-1010.)

Sampson testified that he did not go back to work after August 16 because "I was being paid less money, no benefits, no protection [from Local 669]." When asked about the "no protection" reason for quitting, he explained that Bolyard "can do anything he wants. . . . He can kill your insurance. . . . He can take your truck. . . . He can send you 10,000 miles from home to work. You have no protection whatsoever." (Tr. 1008-1011.) Sampson's personnel record states, "Quit due to labor dispute" (G.C. Exh. 31).

I find that the Company constructively discharged Ronald Moyers on 9/14/94 and Clarence Sampson on 8/17/94, in violation of Section 8(a)(3) and (1).

C. Other Alleged Violations

1. Involving Local 536 members

WARREN BENTERT AND RONALD O'CONNOR. The General Counsel alleges (G.C. Exh. 1Z, par. 23) that the Company "imposed more onerous" conditions of employment on Bentert and O'Connor "by rescinding their privileges to use company-owned vehicles." McCusker admitted that for many years the Company had been providing trucks for them to drive from their homes to the jobsites and back (Tr. 29, 296-297, 641-642).

On August 12 Superintendent Forsythe told Bentert that he could continue doing service work and keep the truck or work at FANX as a fitter. He chose to keep the truck and Forsythe "gave me a job to go to." (Tr. 647-648.) At the parking lot, however, President Bolyard (Tr. 648-649):

came up to me and told me to give him the keys.

Q. Did you say anything to him in response to that?

A. Yes, I told him that [Forsythe] had just told me that I was going to keep the truck, and he says, "Well, you are going to FANX now," and he kind of abruptly grabbed the keys out of my hands.

That same morning, after Chief Engineer Barnhart assigned him work for the day, O'Connor was going to his company-owned truck when (Tr. 302-303)

Mr. Bolyard come out, told me to give him the keys for the truck.

Q. Did you say anything to him?

A. I told him I needed the keys to the truck to go to work. He told me that no, I had quit the day before. I said no. I didn't say I quit. I said I didn't know what I was going to do at the time. He told me the truck was already promised out to somebody else. I gave him the keys to it. He said he'd have somebody take me to either the jobsite or home. Whatever I needed to be done.

. . . .

Q. Since that time, has the company assigned any other truck or vehicle to you for your use?

A. No. . . . I had to buy a car. [Emphasis added.]

The Company contended in its September 15 position statement (G.C. Exh. 45 p. 7) that after it implemented its final offer, Bentert and O'Connor "refused to drive company trucks" and "voluntarily handed in the keys they had in their possession." In McCusker's attached affidavit he claimed (G.C. Exh. 45 p. 24), "They states that they did not want to drive trucks for the company any longer." I reject this claim as another of McCusker's fabricated defenses. Bolyard admitted at the trial that he "told" the two foremen "to turn in the keys to the service trucks" (Tr. 103).

The Company contends in its brief (at 32) "there is no evidence in the record that the company ever said or revealed that it was in some way removing the trucks from these two individuals or from anyone else because of any union membership or union activity on the part of any employee."

To the contrary I find that Bolyard was discriminatorily motivated when he overruled the work assignments of union members Bentert and O'Connor that morning, rescinded their "privileges to use company-owned vehicles," and falsely

claimed that O'Connor had quit (as he also claimed that same morning that union members Bloodsworth, Brown, and Hood had quit--found above to be a pretext for eliminating them from the payroll). The Company has failed to show that it would have rescinded the privileges in the absence of their union membership.

I therefore find that the Company on August 12 discriminatorily imposed more onerous conditions of employment on Warren Bentert and Ronald O'Connor because of their union membership, in violation of Section 8(a)(3) and (1).

RICHARD NEWSOME. The General Counsel alleges (G.C. Exh. 1Z, par. 27) that the Company on August 15 discriminatorily removed Newsome from his position at FANX and imposed "onerous and rigorous" conditions of employment on him by assigning him to the Shot Tower jobsite.

Newsome was the FANX foreman, working on light duty after his shoulder injury in May. On Monday, August 15, when he reported to work (after being off on a long weekend from Thursday noon, August 11, leaving Todd Rife as acting foreman), the Company reassigned him to work as a fitter at the Shot Tower subway jobsite. He protested that he was on light duty, first to Forsythe and then to Bolyard, but to no avail. When he reminded Bolyard "that I was supposed to be on light duty . . . that didn't make any difference to him." (Tr. 130, 508, 516, 586-588.)

As required, Newsome proceeded on August 15 to do the assigned work, which was beyond his light-duty capacity. Later that day on the job he reinjured his shoulder, causing him to be off work until September 6 (Tr. 588-592, 596-599). By that

time the Company had hired nonunion foreman Reid for the FANX job. As found, after being hired on August 23 Reid joined in the Company's preparation to unlawfully eliminate Local 536 members Birmingham, Crosby, and Paca from the FANX payroll on September 6. Also as found, the Company discriminatorily refused after September 6 to reinstate Newsome.

I find that the Company removed Newsome from his foreman position at FANX on August 15 and imposed on him the Shot Tower working conditions (which, because of his injured shoulder, were "onerous and rigorous" for him) to enable it to replace him with a nonunion foreman, I further find that the Company has failed to show that it would have reassigned him in the absence of this discriminatory motivation.

I therefore find that the Company discriminatorily removed Newsome on August 15 from his foreman position at FANX and imposed onerous and rigorous conditions of employment on him by assigning him to the Shot Tower jobsite because of his union membership, violating Section 8(a)(3) and (1).

TODD RIFE. The General Counsel alleges (G.C. Exh. 1Z, par. 28) that the Company on August 23 (when it hired Reid) discriminatorily removed Rife from his position (as foreman) at FANX. I find, however, that this allegation must be dismissed because Todd was merely an acting foreman (Tr. 130, 508, 516).

OVERTIME AT FANX. The General Counsel alleges (G.C. Exh. 1Z, par. 29) that the Company on September 3 "failed and refused to permit employees who were members of the Union to perform overtime work" (at FANX).

On Friday, September 2, there were five Local 536 members working at FANX (Warren Bentert, James Birmingham, Stefan Buitron, Howard Crosby, and Todd Rife) and four nonunion employees (Joseph Edelen, Daniel Green, Stacy Gillis, and Thomas Lewis). On Saturday, September 3, none of the union employees and six nonunion employees worked. (Tr. 1141, 1145-1146; G.C. Exh. 86 p. 11.)

On that Saturday, besides three of the nonunion employees who worked on Friday (Green, Gillis, and Lewis), there was one nonunion employee who last worked on Thursday (Keith Hamilton--but not union member Stephen Paca, who also worked that Thursday), along with two nonunion foremen (Russell Bonner, who was an outsider, and Reid, who worked with Lewis on the standpipes that day) (G.C. Exh. 86 pp. 9, 11; R. Exh. 11).

It is undisputed that "normally everybody" working at the jobsite is offered the overtime if weekend work is required (Tr. 337, 525). When Crosby asked Reid "why weren't we asked to work," as Crosby credibly testified, Reid said "it was a last minute decision by Dewey Forsythe and he only contacted his men to work" (Tr. 337).

Forsythe denied at the trial that he talked to Reid "about who should be selected for overtime opportunities" and claimed that Reid "made the final decision about who would receive overtime opportunities" at FANX (Tr. 131-132).

As Birmingham, Crosby, and Todd Rife credibly testified, none of the union members was asked or given the opportunity to work the weekend overtime (Tr. 336-337, 381, 525). Reid, however, claimed that "everybody was asked" and that "I would be reasonably positive" that "all of the [Local] 536

members turned down an opportunity to work that day" because "I needed everybody I could get" (Tr. 1141-1142). Yet he conceded that the three members on the sixth floor (Birmingham, Crosby, and Paca) "more than likely" were the ones who said on the Tuesday after Labor Day: "Wow, somebody was here working," as he testified was obvious (Tr. 1142).

Upon further questioning, Reid claimed "to the best of my recollection" he would have asked all of the union members if they could work that weekend because "I needed men. . . . I needed everybody I could get there. . . . I would be able to say with 90 percent [certainty] that I would have." (Tr. 1146.) Regarding foreman Bonner, who was not a regular FANX employee. Reid testified that he did not communicate with Bonner about working that Saturday, that Forsythe did (Tr. 1178).

I discredit Forsythe's denial that he talked to Reid about who should be selected for the overtime and discredit Reid's claim that the union members turned down the overtime.

I find that the Company discriminatorily assigned the weekend overtime work exclusively to nonunion employees and failed to permit Local 536 members Warren Bentert, James Birmingham, Stefan Buitron, Howard Crosby, and Todd Rife to perform the overtime on September 3 because of their union membership or activity, violating Section 8(a)(3) and (1).

KELLY PREUETT. The General Counsel alleges (G.C. Exh. 1-OOO, par. 5) that about October 18 McCusker "informed employees it would not permit them to run jobs because of their union affiliation."

Journeyman Preuett testified that about October he told McCusker in the office that he "was concerned about getting to run work," that "I had been with the Company" a long time, and "some of these guys that were running work [as foremen] above me had not been with the Company that long. Preuett testified that McCusker responded that "with the affiliation that I had with my father, I'd be unable to run work at this time." His father is an official of the International. (Tr. 761-763.)

McCusker admitted that Preuett's father was mentioned in the conversation, but denied that he told Preuett he could not run work as a foreman because of his father's affiliation with the Union (Tr. 1406-1408). I discredit the denial and credit the testimony of Preuett, who appeared to be a truthful witness.

I find that McCusker's statement that Preuett could not run work at that time because of the union affiliation was coercive and violated Section 8(a)(1).

2. Involving Local 669 members

JEREMY BUCHANAN. The General Counsel alleges (G.C. Exh. 1NN, par. 25) that since August 11 the Company "Changed the locks on tool boxes and refused to issue a key to union members."

It is undisputed, as Buchanan credibly testified, that after August 11 "All the locks were changed" on the jobsite gang boxes (where the employees keep the company tools). Although new (nonunion) employees were given keys to the gang boxes, "I never received a key." (Tr. 1001-1002.)

I find that this obvious discrimination against Jeremy Buchanan because of his union membership violated Section 8(a)(3) and (1).

CLARENCE SAMPSON. The General Counsel alleges (G.C. Exh. 1NN, par. 21) that on August 12, Bolyard "Implied if an employee resigned from Local 669," the Company "could make the employee a better deal."

It is undisputed, as Sampson credibly testified, that on August 12 in the office, when Bolyard offered him $ 20 an hour to work as a foreman (Tr. 1007-1008):

I asked [Bolyard] was that the best he would offer. He said, "Well, that's the best I can offer you at this time. But anybody that resigns their cards, I can maybe make a better offer to at a later date."

I find that this implied promise of a higher wage rate if Clarence Sampson resigned his union card was coercive and violated Section 8(a)(1).

Conclusions of Law

1. By bargaining in bad faith with Local 536 and Local 669, precluding valid impasse, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

2. By bypassing Local 536 and Local 669 and dealing directly with individual employees in the bargaining units in derogation of the Locals' status as exclusive bargaining representatives of the employees, the Company violated Section 8(a)(5) and (1).

3. By making unilateral changes in mandatory subjects of bargaining in the Local 536 and Local 669 bargaining units on and after August 11 the Company violated Section 8(a)(5) and (1).

4. By unilaterally changing the scope of the Local 536 and Local 669 bargaining units, creating a "helper" classification outside the bargaining units without the Locals' consent and nullifying the separate bargaining units based on the Locals' territorial jurisdictions, the Company violated Section 8(a)(5) and (1).

5. By refusing to hire Local 536 members Scott Dyott, Melvin Haynes, David Rehbein, and Steven Stricker and to reinstate members Frederick Kraeuter, Richard Newsome, Roy Rife, and Ronald Rutkowski because of their union membership, the Company violated Section 8(a)(3) and (1).

6. By refusing to hire Local 669 members Laurence Davidson, Stephen Griffith, Edward Saunders, and James Spitzer because of their union membership, the Company violated Section 8(a)(3) and (1).

7. By discharging Local 536 members James Birmingham, Steven Bloodsworth, Joseph Brown, Howard Crosby, Todd Hood, Stephen Paca, and Todd Rife because of their union membership or activity, the Company violated Section 8(a)(3) and (1).

8. By constructively discharging Local 536 members Stefan Buitron, Michael Ford, Edward Gnip, Robert Grimm, Jimmie Love, and Kelly Preuett and Local 669 members Ronald

Moyers and Clarence Sampson, the Company violated Section 8(a)(3) and (1).

9. By imposing more onerous conditions of employment on Local 536 members Warren Bentert and Ronald O'Connor by rescinding their privileges to use company-owned vehicles because of their union membership, the Company violated Section 8(a)(3) and (1).

10. By removing Local 536 member Richard Newsome from his foreman position on light duty at FANX and imposing onerous and rigorous conditions of employment on him because of his union membership, the Company violated Section 8(a)(3) and (1).

11. By failing to permit Local 536 members Warren Bentert, James Birmingham, Stefan Buitron, Howard Crosby, and Todd Rife to perform overtime work, the Company violated Section 8(a)(3) and (1).

12. By informing Local 536 member Kelly Preuett that he could not run work as a foreman because of his union affiliation, the Company violated Section 8(a)(1).

13. By failing to provide Local 669 member Jeremy Buchanan a key to the locks on tool boxes because of his union membership, the Company violated Section 8(a)(3) and (1).

14. By making an implied promise of a higher wage rate to Local 669 member Clarence Sampson if he resigned his Local 669 union card, the Company violated Section 8(a)(1).

15. The February 14, 1995 suspension and February 20, 1995 discharge of Local 536 member Warren Bentert did not violate Section 8(a)(3) and (1).

16. The removal of Local 536 member Todd Rife from his position as acting foreman at the FANX jobsite did not violate Section 8(a)(3) and (1).

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, in the absence of valid impasse in its separate negotiations with Locals 536 and 669, unlawfully made unilateral changes in wages, benefits, and other working conditions that are mandatory subjects of bargaining. It must on request of Local 536 and Local 669 on behalf of their respective bargaining units, rescind any or all unilateral changes implemented in the unit on and after August 11, 1994, and restore the working condition or conditions retroactive to that date. On the request, the Respondent must remit any payments it has failed to make to the NASI union health and pension benefit funds since August 11, 1994, and make whole its employees for any resulting direct losses, in the manner set forth in Kraft Plumbing & Heating, 252 N.L.R.B. 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Any amounts that the Respondent must pay into the benefit funds shall be determined in the manner set forth in Merryweather Optical Co., 240 N.L.R.B. 1213 (1979).

The Respondent discriminatorily discharged, constructively discharged, and refused to hire or reinstate a total of 27 employees. It must offer them employment, displacing if necessary employees assigned to their jobs or the jobs they would have been assigned. If there is an insufficient number of jobs for all of them, it must place the names of the remaining employees on a preferential list and offer them employment in the order of their seniority or date of application. The Respondent must make the employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of its discriminatory conduct to date of proper offer of employment or placement on the preferential list, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 N.L.R.B. 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 N.L.R.B. 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[2]

ORDER

The Respondent, American Automatic Sprinkler Systems, Inc., Owings Mills, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

---

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Refusing to bargain in good faith with Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:
All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 536, excluding office clerical employees, guards, and supervisors as defined in the Act.

b. Refusing to bargain in good faith with Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 669, excluding office clerical employees, guards, and supervisors as defined in the Act.

c. Bypassing Local 536 and Local 669 and dealing directly with employees in the bargaining units in derogation of the Locals' status as exclusive bargaining representatives of the employees.

d. Making unilateral changes in mandatory subjects of bargaining in the respective bargaining units until it and the Local representing the unit either agree on a new contract or reach a good-faith impasse in negotiations.

e. Unilaterally changing the scope of the Local 536 and Local 669 bargaining units by creating a "helper" classification outside the bargaining units without the Locals' consent or by nullifying the separate bargaining units based on the Locals' territorial jurisdictions.

f. Assigning bargaining unit work to employees outside the bargaining units.

g. Discharging, constructively discharging, denying overtime, imposing more onerous or rigorous working conditions, denying privileges, or otherwise discriminating against any employee because of his membership or activity on behalf of Local 536 or Local 669.

h. Refusing to hire or reinstate employees because of their membership in Local 536 or Local 669.

Informing any employee that he could not run work as a foreman because of his union affiliation.

j. Making an implied promise to any employee of a higher wage rate if he resigned his union card.

k. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

a. On request, bargain with Local 536 and Local 669 as the exclusive representatives of the employees in their respective appropriate bargaining units concerning terms and conditions

of employment and, if understanding is reached, embody the understanding in a signed agreement.

b. On request of Local 536 and Local 669 on behalf of their respective units, rescind any or all unilateral changes in mandatory subjects of bargaining implemented on and after August 11, 1994, and restore the working condition or conditions retroactive to that date.

c. On their request, remit any payments it owes the Locals' health and pension funds and make whole its employees for any losses directly attributable to the cancellation of these benefits, in the manner set forth in the remedy section of the decision.

d. Offer the following employees immediate employment to their former jobs or the jobs to which they would have been assigned or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed--displacing if necessary employees assigned to the jobs and placing any remaining employees on a preferential list as provided in the remedy section--and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision:

James Birmingham	Stephen Griffith
Kelly Preuett	
Steven Bloodsworth	Robert Grimm
David Rehbein	
Joseph Brown	Melvin Haynes
Roy Rife	
Stefan Buitron	Todd Hood
Todd Rife	

Howard Crosby	Frederick Kraeuter
Ronald Rutkowski	
Laurence Davidson	Jimmie Love
Clarence Sampson	
Scott Dyott	Ronald Moyers
Edward Saunders	
Michael Ford	Richard Newsome
James Spitzer	
Edward Gnip	Stephen Paca
Steven Stricker	

e. Remove from its files any reference to the unlawful discharges and notify the discharged employees in writing that this has been done and that the discharges will not be used against them in any way.

f. Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

g. Post at its facility in Owings Mills, Maryland, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt

---

[3] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

h. Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaints are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. February 26, 1996

Marion C. Ladwig, Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada,

AFL-CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 536, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 669, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT bypass Local 536 and Local 669 and deal directly with our employees in derogation of the Locals' status as exclusive bargaining representatives.

WE WILL NOT make changes in wages, benefits, and other working conditions without an agreement or good-faith impasse in negotiations.

WE WILL NOT change the scope of the bargaining units by creating a helper classification without union consent or by nullifying the Locals' separate bargaining units.

WE WILL NOT assign bargaining unit work to employees outside the bargaining units.

WE WILL NOT discharge, constructively discharge, deny overtime, impose more onerous working conditions, deny any privileges, or otherwise discriminate against any of you because of your membership or activity on behalf of Local 536 or Local 669.

WE WILL NOT refuse to hire or reinstate employees because of union membership.
WE WILL NOT say you can not run work as a foreman because of your union affiliation.

WE WILL NOT promise a higher wage rate if you resign your union card.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local 536 and 669 and put in writing and sign any agreement reached on terms and conditions of employment.

WE WILL, on request of Local 536 and Local 669 on behalf of their respective bargaining units, cancel any or all changes we made on and after August 11, 1994, and restore the working condition or conditions retroactive to that date.

WE WILL, on their request, remit any payments we owe the Locals' health and pension funds and make whole our employees for any losses resulting from our canceling these benefits.

WE WILL offer the following employees immediate employment to their former jobs or the jobs to which they would have been assigned or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed--displacing if necessary employees assigned to those jobs and placing any remaining employees on a preferential hiring list--and make them whole for any loss of earnings and other benefits resulting from our discharging, constructively discharging, or refusing to hire or reinstate them, less any net interim earnings, plus interest:

James Birmingham
Kelly Preuett
Steven Bloodsworth
David Rehbein
Joseph Brown
Roy Rife
Stefan Buitron
Todd Rife
Howard Crosby
Ronald Rutkowski
Laurence Davidson
Clarence Sampson
Scott Dyott
Edward Saunders
Michael Ford
James Spitzer
Edward Gnip
Steven Stricker
Stephen Griffith
Robert Grimm
Melvin Haynes
Todd Hood
Frederick Kraeuter
Jimmie Love
Ronald Moyers
Richard Newsome
Stephen Paca

WE WILL notify the discharged employees that we have removed from our files any reference to their discharge and that the discharge will not be used against them in any way.

AMERICAN AUTOMATIC SPRINKLER SYSTEM, INC.
(Employer)

This is an official notice and must not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 103 South Gay Street, 8th Floor, Baltimore, Maryland 21202-4026, Telephone 410-962-2772.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 536, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT refuse to bargain in good faith with Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All journeymen sprinkler fitters and apprentices employed by American Automatic Sprinkler Systems in the jurisdiction of Local 669, excluding office clerical employees, guards, and supervisors as defined in the Act.

WE WILL NOT bypass Local 536 and Local 669 and deal directly with our employees in derogation of the Locals' status as exclusive bargaining representatives.

WE WILL NOT make changes in wages, benefits, and other working conditions without an agreement or good-faith impasse in negotiations.

WE WILL NOT change the scope of the bargaining units by creating a helper classification without union consent or by nullifying the Locals' separate bargaining units.

WE WILL NOT assign bargaining unit work to employees outside the bargaining units.

WE WILL NOT discharge, constructively discharge, deny overtime, impose more onerous working conditions, deny any privileges, issue a verbal warning, or otherwise discriminate against any of you because of your membership or activity on behalf of Local 536, Local 669, or any other labor organization.

WE WILL NOT refuse to hire or reinstate employees because of their union membership.

WE WILL NOT tell you that you cannot run work as a foreman because of your union affiliation.

WE WILL NOT promise a higher wage rate if you resign your union card.

WE WILL NOT instruct any employee not to discuss his rate of pay with other employees.

WE WILL NOT inform any employee that we are going nonunion while the employees are represented by a majority representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with Local 536 and Local 669 and put in writing and sign any agreement reached on terms and conditions of employment.

WE WILL, on request of Local 536 and Local 669, on behalf of their respective bargaining units, cancel any or all changes we made on and after August 11, 1994, and restore the working condition or conditions retroactive to that date.

WE WILL, on their request, remit any payments we owe the Locals' health and pension funds and WE WILL make whole our employees for any losses resulting from our canceling these benefits.

WE WILL, within 14 days from the date of this Order, offer the following employees immediate employment in their former jobs or the jobs to which they would have been assigned or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed--displacing if necessary employees assigned to the jobs and placing any remaining employees on a preferential list as provided:

William Bentert
James Birmingham
Steven Bloodsworth

Joseph Brown
Stefan Buitron
Howard Crosby
Laurence Davidson
Edward Gnip
Stephen Griffith
Robert Grimm
Melvin Haynes
Todd Hood
Frederick Kraeuter
Jimmie Love
Stephen Paca
Kelly Preuett
David Rehbein
Roy Rife
Todd Rife
Ronald Rutkowski
Clarence Sampson
Scott Dyott
Michael Ford
Ronald Moyers
Richard Newsome
Edward Saunders
James Spitzer
Steven Stricker

WE WILL make whole any of the employees listed above, for any loss of earnings and other benefits suffered as a result of our actions against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the warning and discharges, and within 3 days thereafter WE WILL notify the

employees in writing that this has been done and that the warning and discharges will not be used against them in any way.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 97-1821; 97-2014

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

On Petition for Rehearing and Rehearing En Banc

Filed March 12, 1999

The intervenor's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Nos. 97-1821; 97-2014

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INCORPORATED, Respondent,

and

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, U.A., AFL-CIO, Intervenor.

JUDGMENT

Filed January 14, 1999

Before: WIDENER and LUTTIG, Circuit Judges, and MAGILL, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

THIS CAUSE came to be heard upon a petition filed by American Automatic Sprinkler Systems, Inc., to review an order of the National Labor relations Board in Board Case Nos. 5-CA-24636, 5-CA-24681, 5-CA-24719, 5-CA-25047, 5-CA-24738, 5-CA-24895, 5-CA-25029, 5-CA-24641, 5-CA-24642, 5-CA-24647, 5-CA-24674, 5-CA-24695, 5-CA-24715, 5-CA-24896, 5-CA-25017, 5-CA-25075, 5-CA-25130, and 5-CA-25255, issued on June 11, 1997, and upon a cross-application filed by the National Labor Relations Board to enforce said Order. The Court heard argument of respective counsel on September 23, 1998, and has considered the briefs and transcript of record filed in this cause. On December 17, 1998, the Court, being fully advised of the premises, handed down its opinion granting in part and denying in part enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that the Petitioner, American Automatic Sprinkler Systems, Inc., Owing Mills, Maryland, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, denying overtime, imposing more onerous or rigorous working conditions, denying privileges, or otherwise discriminating against any employee because of his membership or activity on behalf of Sprinkler Fitters United Association Local Union No. 536, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO and Road Sprinkler Fitters Local Union No. 669, U.A., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, or any other labor organization.

(b) Refusing to hire or reinstate employees because of their membership in Local 536, Local 669, or any other labor organization.

(c) Informing any employee that he could not work as a foreman because of his union affiliation.

(d) Making an implied promise to any employee of a higher wage rate if he resigned his union card.

(e) Instructing any employee not to discuss his rate of pay with other employees.

(f) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act ("the Act").

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer the following employees immediate employment in their former jobs or the jobs to which they would have been assigned or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to any seniority or other rights or privileges previously enjoyed-displacing if necessary employees assigned to the jobs and placing any remaining employees on a preferential list as provided for in the remedy section of the administrative law judge's decision:

William Bentert
James Birmingham
Steven Bloodsworth
Joseph Brown
Howard Crosby
Laurence Davidson
Stephen Griffith
Melvin Haynes
Todd Hood
Frederick Kraeuter
Stephen Paca
David Rehbein
Roy Rife
Todd Rife
Ronald Rutkowski
Scott Dyott
Richard Newsome
Edward Saunders
James Spitzer
Steven Stricker

(b) Make whole employees listed below for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision:

William Bentert
James Birmingham
Steven Bloodsworth
Joseph Brown
Howard Crosby
Laurence Davidson
Stephen Griffith
Melvin Haynes
Stephen Paca
David Rehbein
Roy Rife
Todd Rife
Ronald Rutkowski
Scott Dyott
Richard Newsome
Edward Saunders

Todd Hood	James Spitzer
Frederick Kraeuter	Steven Stricker
Stefan Buitron	

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(e) Within 14 days after service by the Region, post at its facility in Owing Mills, Maryland, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 5 of the National Labor Relations Board (Baltimore, Maryland), after being signed by the Petitioner's authorized representative, shall be posted by the Petitioner and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Petitioner to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Petitioner has gone out of business or closed the facility involved in these proceedings, the Petitioner shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Petitioner at any time since August 10, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Petitioner has taken to comply.

IT IS FURTHER ORDERED that the parties shall bear their own costs.

Entered at the direction of Judge Luttig, with the concurrence of Judge Widener and Judge Magill, Senior Circuit Judge, Eighth Circuit, sitting by designation.

For the court,

/s/ _____
Patricia S. Connor, clerk

APPENDIX E

The provisions of the National Labor Relations Act, as amended, which are herein involved are as follows:

SEC.8 (a) It shall be an unfair labor practice for an employer -

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of ime or pay;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

SEC.8 (f) Agreement covering employees in the building and construction industry. It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership

in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) of this title.

SEC.9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representative of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

SEC.10 (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge ...

Supreme Court, U.S.
FILED
AUG 11 1999
OFFICE OF THE CLERK

No. 98-1986

IN THE

Supreme Court of the United States

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.,

-and-

NATIONAL LABOR RELATIONS BOARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.

LAWRENCE E. DUBÉ, JR.
Counsel of Record
DUBÉ & GOODGAL, P.C.
Suite 407
The Can Company
2400 Boston Street
Baltimore, Maryland 21224
(410) 276-8801

Attorneys for Respondent American Automatic Sprinkler Systems, Inc.

153893

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

PARTIES TO THE PROCEEDING

The parties to the proceeding are accurately listed on the Petition. Respondent American Automatic Sprinkler Systems, Inc. is a privately-held corporation. No parent or publicly held corporation holds 10% or more of American's stock.

TABLE OF CONTENTS

	Page
Parties to the Proceeding	i
Table of Contents	ii
Table of Cited Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	12
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Cases:

Brannan Sand & Gravel Co., 289 NLRB 977 (1988) 4

Casale Industries, 311 NLRB 951 (1993) 5, 16

Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983) ... 7

John Deklewa & Sons, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988) 8

Local Lodge 1424, Machinists v. NLRB (Bryan Manufacturing Co.), 362 U.S. 411 (1960) 5

MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341 (10th Cir. 1996) 14

NLRB v. Goodless Electric Co., 124 F.3d 322 (1st Cir. 1997) 6

NLRB v. Local 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon Const. Co.), 434 U.S. 335 (1978) 6, 7

NLRB v. Triple A Fire Protection, Inc., 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 795 (1999) 13, 14

Cited Authorities

Page

Triple A Fire Protection, 312 NLRB 1088 (1993) 11, 13

Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645 (1982) 10

Statutes:

29 U.S.C. § 153(d) 11

29 U.S.C. § 157 6

29 U.S.C. § 158(a)(5) 2, 7

29 U.S.C. § 158(f) 7, 8, 9, 10, 15

29 U.S.C. § 159(a) ..... *passim*

29 U.S.C. § 160(b) 4, 5, 6, 8

STATEMENT OF THE CASE

American Automatic Sprinkler Systems (herein referred to as "American Automatic" or "American") is an Owings Mills, Maryland firm engaged in construction-industry fabrication, installation and servicing of fire sprinkler systems. Pet. App. 3a.

Since it began operations in 1974, American had been a party to successive collective-bargaining agreements with Sprinkler Fitters Local 536, and with Local 669 (the Petitioner) by virtue of its membership in a multiemployer bargaining association. These negotiated collective-bargaining agreements established the terms and conditions of employment for American's journeymen and apprentice sprinkler fitter employees employed in the respective territorial jurisdictions of Locals 536 and 669. Pet. App. 4a. Local 536 jurisdiction encompassed Baltimore, Maryland and a surrounding zone. Local 669 claimed jurisdiction over American's operations outside the Baltimore area. Pet. App. 3a.

In late January, 1994, American notified both Locals 669 and 536 that it was withdrawing bargaining authority from the multiemployer association, and intended thereafter to bargain independently with the separate unions. Pet. App. 5a. Negotiating sessions were conducted separately with the two unions concerning possible collective bargaining agreements to replace the union contracts which were expiring that year. The Local 536 agreement expired by its terms on May 31, 1994, while the Local 669 agreement expired on March 31, 1994. Pet. App. 5a. American and the unions continued negotiations after the expiration of the contracts, and American maintained in effect the labor

terms (wages, hours and working conditions) of the expired agreements. Agreements were not reached, however, and in mid-August 1994, American determined that an impasse in bargaining had occurred with respect to each union. On August 11, 1994, consistent with its bargaining proposals, the employer implemented changes in wages and other employment matters. Pet. App. 6a. A number of unfair labor practice charges were thereafter filed with the Baltimore Regional Office of the National Labor Relations Board. The Regional Director issued a series of complaints against American, which were consolidated and heard in June 1995 over the course of nine days before an administrative law judge of the NLRB. Pet. App. 48a.

The administrative complaints against American included some allegations of discrimination against individuals, and certain claims of interference with employee rights, not at issue before this Court.[1] Of principal importance here, American was alleged to have violated Section 8(a)(5) of the National Labor Relations Act (herein "NLRA" or "Act"), 29 U.S.C. § 158(a)(5), by failing and refusing to bargain in good faith when it conducted negotiations in 1994 with the two union locals. Pet. App. 49a-51a.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [29 U.S.C. § 159(a)]". 29 U.S.C. § 158(a)(5). Section 9(a), in turn, provides that:

---

1. The Court of Appeals denied enforcement of findings that employees had been "constructively discharged" by American. Pet. App. 28a-29a. Although still referring to those employees as "unlawfully constructively discharged" (Petition, at 3, note 2), Petitioner has not sought review in this Court of the constructive discharge ruling.

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

29 U.S.C. § 159(a). While the NLRB complaints issued against American alleged that majorities of American's employees in the two respective bargaining units had designated the sprinkler fitter locals as their bargaining agents, American consistently denied the existence of majority status in its answers to the various complaints.

At the administrative trial, the NLRB's case against American failed to include affirmative evidence that employees had designated the unions as their chosen bargaining agents. Instead, the NLRB's General Counsel and the local unions chose to rely upon American's bargaining history as proof of the required majorities.

The NLRB's administrative law judge disposed of the issue of majority status in a sentence: "Unquestionably, there exists a Section 9(a) relationship between both Locals 536 and 669 and the Company". Pet. App. 85a. On appeal to the NLRB itself, the Labor Board disposed of the bargaining-obligation issue in three paragraphs. Pet. App. 31a-33a. As to Local 669, the Petitioner before this Court, the Board relied on a 1987 "form recognition agreement — which was accompanied by fringe benefit forms demonstrating majority union membership — recognizing Local 669 as the 9(a) representative of its employees."

"The Board," the panel in *American Automatic* noted, "has previously found that this same form agreement is sufficient to establish 9(a) status." Finally, the NLRB found, American's:

> . . . challenge to the 9(a) status of Locals 669 and 536 was untimely raised. *Casale Industries*, 311 NLRB 951 (1993).

Pet. App. 33a. American sought review of the NLRB decision in the Fourth Circuit. On December 17, 1998, the court denied enforcement of the NLRB's findings of majority status and bargaining violations.

Addressing the timeliness issue first, as has Petitioner Local 669, the Fourth Circuit panel rejected the Board's conclusion of untimeliness in a long footnote. The court described the Board's effort in *American Automatic* and other cases to avoid inquiry into the circumstances of construction-industry recognition agreements later claimed to create Section 9(a) relationships. Pet. App. 19a-20a, note 6. The Court of Appeals, noting the Board's own decision in *Brannan Sand & Gravel Co.*, 289 NLRB 977 (1988), agreed with American that nothing in Section 10(b) of the NLRA "precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period . . . [where] [g]oing back to the beginning of the parties' relationship . . . simply seeks to determine the majority or non-majority based nature of the current relationship." Pet. App. 17a, note 6.

American respectfully submits that the Court of Appeals was correct. Petitioner devotes considerable energy to challenging the lower court's determination that an

examination of the circumstances of Local 669's claim of Section 9(a) bargaining status was not precluded by Section 10(b) of the Act. The Petitioner repeatedly casts its discussion as a debate pro or con on a "Bryan Manufacturing" rule or ruling. The Fourth Circuit, however, recognized that the issue was not simply the application of *Local Lodge 1424, Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), but required an examination of the NLRB's ruling in *Casale Industries*, 311 NLRB 951 (1993), in light of the overall structure and purpose of the NLRA. Petitioner cites *Casale* (Petition, page 16), but does not cite the full NLRB discussion in that case. In *Casale*, the Board actually decided that a "challenge to majority status must be made within a *reasonable period* of time after Section 9 recognition is granted." *Id.* at 953 (emphasis added). It was only after that discussion that the *Casale* majority (the case was decided on a 2-1 vote) identified six months as being that "reasonable" period of time. Section 10(b) of the Act, 29 U.S.C. § 160(b), is a six-month limitation on certain actions under the NLRA, but the statutory provision literally proscribes only the issuance of complaints by the General Counsel, not an examination of the circumstances of union recognition agreements, and the Board appeared in *Casale* to have acknowledged as much.

The Petitioner's efforts to argue the merits of the "rule" or public policy in *Casale* are sometimes inconsistent with the record in this particular case, and with the apparent purposes of the statute. Petitioner argues, for example (Petition, page 19), that industrial peace is somehow not served in "cases like this one" if "no employee has ever raised any objection to union representation. . . ."[2] Obviously, industrial peace and

---

2. The record does not reflect whether any unionized employees of American had ever objected to union representation.

quiet is most likely if unionized employees have never raised an objection to union representation, but that is not the issue that was presented in *American*, and it is not the only policy interest at stake under the NLRA. *NLRB v. Local 103, Int'l Ass'n of Bridge, Structural and Ornamental Iron Workers (Higdon Const. Co.)*, 434 U.S. 335, 344 (1978) ("Privileging unions and employers to execute and observe prehire agreements . . . may have greatly convenienced unions and employers, but in no sense can it be portrayed as an expression of the employees' organizational wishes."). *See also NLRB v. Goodless Electric Co.*, 124 F.3d 322, 330 (1st Cir. 1997) ("[G]eneral contract law principles cannot supplant the requirement of a federal labor policy such as that embodied in Section 9(a) requiring that employees be represented by an organization approved by a majority of employees."). The NLRA was clearly intended not only to serve peace and the expectations of employers and employees, but also to reflect actual choice of unions by employees themselves. The failure of proof in the case presented against American Automatic was the absence of evidence of employee choice. Petitioner's argument for industrial stability — that is, to disregard whether an actual majority supported any apparent grant of employer recognition occurring more than six months ago — would sacrifice the policy of employee free choice which is the keystone of the NLRA. 29 U.S.C. § 157. The appellate court correctly found in this case that Section 10(b) could not reasonably be interpreted to prohibit a construction employer like American from "challenging the validity of the evidence of effective voluntary recognition that is the basis of the *Board's* complaint." Pet. App. 21a, note 6. The Court of Appeals correctly held that American had properly raised "the question whether either [local union] satisfied the requirements for attaining . . . exclusive representative status through voluntary recognition." Pet. App. 19a.

Because the issue of Local 669's majority status (or lack of majority) was not rendered irrelevant by the passage of time since American's 1987 execution of Local 669's form documents, the issue remained whether Local 669 had established its majority status and attendant bargaining rights.

An employer is obligated under Section 8(a)(5) to bargain collectively with a union that has been "designated and selected for the purposes of collective bargaining by the majority of employees," pursuant to Section 9(a) of the Act, 29 U.S.C. § 159(a). The NLRB complaints against American Automatic alleged that the two union locals were and had been for some time the Section 9(a) representatives of American's employees in their respective bargaining units. Without a demonstration of Section 9(a) status, the charges against American would necessarily fail.

There is no dispute in this case that the origins of American's bargaining relationships with Local 536 and Local 669 were not in Section 9(a) contracts, but in construction-industry prehire agreements. Section 8(f) of the Act, 29 U.S.C. § 158(f), "allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority first having been established in the manner provided for under § 9 of the Act." *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983). Neither an employer nor a union is obligated to enter into a Section 8(f) prehire agreement, which generally may be repudiated at any time before a union actually obtains Section 9(a) majority status. Absent "majority credentials . . . the collective bargaining relationship and the union's entitlement to act as the exclusive bargaining agent does not mature." *NLRB v. Local 103*, *supra*, at 346.

In a 1987 decision, *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988), the NLRB announced a series of important holdings concerning the NLRB's treatment of prehire collective bargaining agreements in the construction industry. Among other things, the Board recognized that a Section 8(f) contract could be repudiated, although holding that repudiation could not occur until the expiration date of a written collective bargaining agreement. *Id.* at 1387-88. Of particular relevance to this case,[3] the Board announced that if a party in the construction industry was attempting to show that a contract was not a voidable Section 8(f) agreement, but was a Section 9(a) agreement, "we will require the party asserting the existence of a 9(a) relationship to prove it." *Id.* at 1385 n.41 (emphasis added). The Board went on in *Deklewa* to state that a relationship between a union and employer could be "converted" from Section 8(f) to 9(a) status if voluntary recognition of the union by an employer "is based on a *clear showing of majority support* among the unit employees, e.g. a valid card majority." *Id.* at 1387 n.53 (emphasis added).

Having addressed Local 669's argument that Section 10(b) of the NLRA precluded even delving into American's bargaining history, the Court of Appeals in this case turned to the merits of the refusal-to-bargain charges against American, and to the threshold issue of whether the company even had an obligation to bargain with Local 669 or Local 536 in 1994. The court discussed the NLRB's *Deklewa* decision, and concluded that a union claiming a conversion from Section 8(f) status to Section 9(a)

3. The Court of Appeals reviewed and generally approved the Board's *Deklewa* ruling, which Petitioner does not contest.

bargaining rights had to make a showing of majority support (not just a grant of recognition by an employer) on some basis other than proving the compulsory union membership which could result (with or without the consent of affected employees) from a union-security clause contained in a Section 8(f) construction agreement. Pet. App. 23a-24a.

Local 669's claim of majority status was really documented only by evidence or information which proved the wrong proposition. The fringe benefit reports contained in the record, and the assertion that a majority of American's employees were members of Local 669 in 1987 at the time of the documents in question, proved nothing about voluntary employee free choice. As the court recognized, union membership was at that time required of the employees at American, and their membership (at least without more) did not signify any exercise of free choice. Pet. App. 24a, note 7. Petitioner responds by arguing that:

> And, contrary to the Fourth Circuit decision, the existence of a background union security clause is *not* a basis for invalidating the union's showing of interest based on the bargaining unit employee union membership. In the real word of affairs, voluntary majority union membership among bargaining unit employees comes first and a union security agreement comes second, not the other way around.

(Petition, page 24). The argument is simply inapposite. First, the Court was not involved in "invalidating" any evidence available to Local 669. Instead, the Court simply made the logical observation that where a current contract compels acquisition or retention of union membership, the presence

of a union member on a payroll does not, without more, demonstrate the employee's voluntary choice to become a union member.

Petitioner's assertions about the "real world" — its supposition that union membership levels can only be the product of free choice and grass-roots democracy — is certainly not supported by the record in this case, and is not consistent with the Act or its history. Section 8(f) authorizes employer acceptance of a pre-hire union-shop agreement before a single employee has even been hired, let alone given an opportunity to voice an opinion about unionization, so it is certainly true that not all union shops in the construction industry are the result of grass-roots pressure. Additionally, whether or not legally implemented, the prevalence of "top-down" organizing methods in the construction industry has long been noted by the courts. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982). Individuals employed in union shops who belong to labor unions may or may not voluntarily support a particular union. Since their membership is compulsory, their sentiment can not be presumed — it must be shown.

Local 669 complains that "before the Board, American Automatic did *not* challenge in any way Local 669's claim of majority support insofar as that claim rested on the bargaining unit employees' union membership." (Petition, at 26, emphasis in the original). For that reason, Local 669 now states (without any record support), "the Union did not put in any evidence as to the voluntary nature of that membership." In fact, American had filed answers to the NLRB complaints denying the existence of the requisite majority. As the court below concluded (in a unanimous opinion, with rehearing later denied by the full court), it

was not American's burden to disprove the existence of a union majority; it was the burden of the NLRB or union to prove the existence of that majority. Local 669, and presumably the General Counsel,[4] selected the evidence they presented at the administrative hearing not because of anything American did, but because of the parties' misplaced confidence that other evidence of majority support was simply not needed. Before the NLRB, where Local 669 had successfully prosecuted other cases involving the same documents, e.g., *Triple A Fire Protection*, 312 NLRB 1088 (1993), without additional evidence of majority support, that approach had been successful for the labor organization. In the Court of Appeals, however, where the legal issues raised by the complaints against American Automatic had not yet been tested, the Union's choice to rely on the same documentary case failed to convince the court, since the Court recognized the significance of the failure to offer meaningful evidence of majority support.

Petitioner now argues that:

> If put to the test, Local 669 with the greatest assurance could have made its proof that the union membership here were purely voluntary and strongly held, and that those memberships actively respected the members' designation of the Union as their chosen exclusive collective bargaining representative.

(Petition, page 26). American contended before the Court of Appeals, and has contended since 1995 in the proceedings

4. Pursuant to Section 3(d) of the statute, 29 U.S.C. § 153(d), the cases were actually prosecuted not by Local 669, but by the NLRB General Counsel, who also did not offer such evidence.

before the NLRB, that the NLRB and the charging unions *were* "put to the test" of proving majority support — during the NLRB's 1995 trial. Petitioner complains that American somehow presented to the Court of Appeals a "belated, non-record based, challenge to the Union's showing of majority support. . . ." (Petition, at 26). That is simply not accurate. It is Local 669 which, four years after the administrative trial, argues that it "could have made its proof." Whatever it now believes could have done, the Petitioner failed to make its case at the time of trial provided under the Act, and certainly cannot do so now.[5] American respectfully submits that the Court of Appeals reached a reasonable and correct decision in this case, and that it was the record made by all of the parties which both supports and requires the conclusion reached by the Court of Appeals.

REASONS FOR DENYING THE WRIT

Respondent American respectfully submits that for a number of reasons granting the petition for certiorari in this case is neither essential nor appropriate. Whether or not the Petitioner agrees with the reasoning of the Court of Appeals in this case, Petitioner has not substantiated its claim (Petition, at 13) of "a conflict in the circuits on a recurring questions [sic] of great moment to the proper administration of the National Labor Relations Act", and has failed to make a convincing case for review by the Supreme Court.

---

5. Ironically, Petitioner argues that the Court of Appeals decided an issue on the basis of "a few snippets of non-record fact" tendered by a party who failed to raise the issue before the administrative agency (Petition, page 27). American did not assert the existence of non-record facts before the Court of Appeals, and does not do so now. It is the Petitioner which asks this Court, without a shred of record evidence, to credit its claim that it "could have" proven its case four years ago.

First, it is noteworthy that the National Labor Relations Board has not itself petitioned for review in this case. While an intervenor labor union has the formal right to petition for review by this Court, the fact that the NLRB has not petitioned for certiorari is significant. It is the NLRB which is charged by statute with administering and developing national labor law policy. It is the NLRB which is responsible to monitor and understand the development of case law both in the appellate courts and on the NLRB's own docket of pending cases and anticipated decisions. Respondent American submits that the NLRB's choice not to petition for review may well reflect an NLRB determination that review by this Court is not appropriate.

There are a number of reasons for concluding that review of this decision by the Supreme Court would not be necessary or helpful to American labor and industry in general. Respondent American has argued, *supra*, that the decision of the Fourth Circuit was legally sound and correct on the facts in this case for a number of reasons, but the dispute which Petitioner would now bring to the Court's docket is itself particularly fact-based. The collective bargaining documents upon which Local 669 relies for its claim of Section 9(a) status were, the court below noted, "form" documents created by Local 669 for its signatory contractors. In fact, where Local 669 attempts to point to a split of opinion in the federal circuits on the issue of the union's requisite majority status, it has in large measure pointed only to a division in circuits examining and interpreting Local 669's identical form documents. *NLRB v. Triple A Fire Protection, Inc.*, 136 F.3d 727 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 795 (1999)[6];

6. The decision of the Eleventh Circuit in *Triple A* is not identical to the situation in *American Automatic*. In *Triple A*, the (Cont'd)

MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341 (10th Cir. 1996)[7]. Such a split of federal judicial opinion may have practical implications for this labor union doing business in more than one circuit, but that practical interest of Local 669 does not demonstrate the significance of the issue to other unions or employers, and does not justify the review sought here.[8]

Notwithstanding Local 669's overheated depiction of the dire effects of the *American Automatic* decision, a simple citation check as of the writing of this Response has not revealed *any* reported decisions even mentioning the Fourth Circuit's *American Automatic* ruling, which is now eight months old. Though the ruling may have raised practical questions about the efficacy of Local 669's form documents, the decision has certainly not created the reverberations for others which Local 669 has predicted in its Petition.

(Cont'd)
court noted, 136 F.3d at 735, that the company had, except for an unsuccessful coercion claim, failed "to argue that there was no conversion to full section 9(a) status" and "does not argue that there was merely a section 8(f) relationship. . . ." Those were, of course, precisely the arguments successfully made by American in this case.

7. The brief opinion in *MFP Sprinkler* cited only two of the NLRB's decisions, and did not discuss or consider the authorities examined by the Fourth Circuit in this case.

8. American continues to operate its business in an unresolved Chapter 11 bankruptcy proceeding. American's need for finality in this litigation, which has gone on for more than four years, should be balanced against Local 669's interest in a legal issue of interest to the union.

One reason that the *American Automatic* decision may not yet have found its way into other labor and management controversies is the fact-based nature of the *American Automatic* case. The Court of Appeals certainly did not say that construction unions which were parties to Section 8(f) agreements with employers could never demonstrate a successful conversion to Section 9(a) status. It is clear that in some manner such a change can be accomplished. The debate in this case has been whether the evidence relied on to show such majority status sufficiently reflected the existence of a free and uncoerced majority of employees necessary to give the union the desired status as an exclusive bargaining agent under Section 9(a).[9]

The problem in this case was not a disagreement about whether proof of majority status should be required by the NLRB or reviewing courts; the dispute is whether a sufficient showing was made. Local 669, in fact, now confidently claims that "if put to the test" it would have been well-armed to demonstrate actual employee choice or designation of the union as an exclusive bargaining agent. The appellate court opinion in *American Automatic* certainly spells out the necessity for unions to produce such evidence if they are, in the future, "put to the test" of supporting an unfair labor practice charge against an employer. Accordingly, even if the Fourth Circuit incorrectly required unnecessary evidence from complaining unions, there is no reason for believing that the unions will not provide the required evidence of majority support just as easily as Local 669 now claims that it could.

9. Local 669's Petition makes no mention of the lower court's disposition of the Section 9(a) issue raised on behalf of its companion organization, Local 536. The court in fact found that the evidence as to that local as well failed to show, either through contract language or testimony, that the Local had attained majority support among American's employees. Pet. App. 25a-28a.

Finally, Respondent American submits that a review by this Court of the Fourth Circuit decision is not required or warranted by the lower court's discussion of *Casale Industries*, or the issue of time limits under the NLRA. While Local 669 has pointed to a contrast in the circuits concerning the NLRB's use of *Casale*, American has pointed out, *supra*, that there remains significant uncertainty about the NLRB's foundation for *Casale*, and its precise meaning. It may well be that the NLRB's review of *Casale*, and a rationalization of the administrative agency's views, will follow from the announcement of the decision in *American Automatic*. Certainly, such a clarification by the NLRB would be appropriate. Given the comparative newness of the issue, the absence of substantial settled precedent in the lower courts, and the possibility of refinement or revision of the NLRB stance on this issue, Respondent American submits that granting review of the decision in this case could inject the Court into an issue which has not yet fully been litigated or settled by the parties to whom it most matters.

CONCLUSION

Respondent American Automatic Sprinkler Systems, Inc. respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

LAWRENCE E. DUBÉ, JR.
Counsel of Record
DUBÉ & GOODGAL, P.C.
Suite 407
The Can Company
2400 Boston Street
Baltimore, Maryland 21224
(410) 276-8801

Attorneys for Respondent American Automatic Sprinkler Systems, Inc.

Supreme Court, U.S.
FILED
AUG 11 1999
CLERK

No. 98-1986

In the Supreme Court of the United States

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, ETC., PETITIONER

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the union established that, in its bargaining relationship with a construction industry employer, it had attained the full representative status accorded by Section 9(a) of the National Labor Relations Act, 29 U.S.C. 159(a), rather than the limited representative status accorded by Section 8(f) of the Act, 29 U.S.C. 158(f).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Brannan Sand & Gravel Co., 289 N.L.R.B. 977 (1988)	10, 15-16
California Saw & Knife Works, 320 N.L.R.B. 224 (1995), enforced *sub nom. IAM & Aerospace Workers* v. *NLRB*, 133 F.3d 1012 (7th Cir.), cert. denied, 119 S. Ct. 47 (1998)	17
Casale Indus., Inc., 311 N.L.R.B. 951 (1993)	7, 10
Decorative Floors, Inc., 315 N.L.R.B. 188 (1994)	15
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985)	17-18
Hovey Elec., Inc., 328 N.L.R.B. No. 35 (Apr. 30, 1999)	11
International Ladies' Garment Workers' Union v. *NLRB*, 366 U.S. 731 (1961)	2
J&R Tile, Inc., 291 N.L.R.B. 1034 (1988)	15, 17
Jim McNeff, Inc. v. *Todd*, 461 U.S. 260 (1983)	3
John Deklewa & Sons, Inc., 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988)	2, 3, 4, 10, 15, 16
Local Lodge 1424, IAM v. *NLRB (Bryan Mfg. Co.)*, 362 U.S. 411 (1960)	9

Cases—Continued: Page

MFP Fire Protection, Inc. v. *NLRB*, 101 F.3d 1341 (10th Cir. 1996) 5, 12, 13
Mastro Plastics Corp. v. *NLRB*, 350 U.S. 270 (1956) 15
NLRB v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990) 4
NLRB v. *General Motors Corp.*, 373 U.S. 734 (1963) 17
NLRB v. *Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978) 3
NLRB v. *Triple A Fire Protection, Inc.*, 136 F.3d 727 (11th Cir. 1998), cert. denied, 119 S. Ct. 795 (1999) 5, 9-10, 12, 13
NLRB v. *Viola Indus.-Elevator Div., Inc.*, 979 F.2d 1384 (1992) 13
Oklahoma Installation Co., 325 N.L.R.B. No. 140 (May 14, 1998), application for enforcement filed, No. 98-9524 (10th Cir. July 1, 1998) 14
Precision Striping, Inc. v. *NLRB*, 642 F.2d 1144 (9th Cir. 1981) 16-17
R.J. Smith Constr. Co., 191 N.L.R.B. 693 (1971), enforcement denied *sub nom. Local No. 150, Int'l Union of Operating Eng'rs* v. *NLRB*, 480 F.2d 1186 (D.C. Cir. 1973) 3
Triple A Fire Protection, Inc., 312 N.L.R.B. 1088 (1993), enforced, 136 F.3d 727 (11th Cir. 1998), cert. denied, 119 S. Ct. 795 (1999) 6-7
Triple C Maintenance, Inc., 327 N.L.R.B. No. 15 (Oct. 30, 1998), application for enforcement filed, No. 99-9500 (10th Cir. Jan. 19, 1999) 14-15
United Paperworkers Int'l Union (Weyerhaeuser Paper Co.), 320 N.L.R.B. 349 (1995), enforcement denied on other grounds *sub nom. Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S. Ct. 442 (1998) 17

Statute: Page

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(2), 29 U.S.C. 158(a)(2) 11
§ 8(a)(5), 29 U.S.C. 158(a)(5) 3, 6, 7
§ 8(f), 29 U.S.C. 158(f) ..... *passim*
§ 8(f)(1), 29 U.S.C. 158(f)(1) 2
§ 9(a), 29 U.S.C. 159(a) ..... *passim*
§ 10(b), 29 U.S.C. 160(b) 9, 10, 11, 12, 13

In the Supreme Court of the United States

No. 98-1986

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, ETC., PETITIONER

v.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 163 F.3d 209. The decision and order of the National Labor Relations Board (Pet. App. 30a-48a) and the decision of the administrative law judge (Pet. App. 48a-181a) are reported at 323 N.L.R.B. 920.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1999. A petition for rehearing was denied on March 12, 1999 (Pet. App. 182a-183a). The petition for a writ of certiorari was filed on June 10, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is ordinarily an unfair labor practice for an employer to enter into a collective bargaining agreement with a union that has not been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes" pursuant to Section 9(a) of the National Labor Relations Act (Act), 29 U.S.C. 159(a). See *International Ladies' Garment Workers' Union* v. *NLRB*, 366 U.S. 731 (1961). Section 8(f) of the Act, 29 U.S.C. 158(f), however, creates an exception to that general principle for the building and construction industry. Section 8(f) provides that it is not an unfair labor practice for an employer and a union "to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry * * * because (1) the majority status of such labor organization has not been established under the provisions of section 9" of the Act. 29 U.S.C. 158(f)(1).

In *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), the National Labor Relations Board (Board) substantially revised its interpretation of Section 8(f). Under the Board's previous interpretation, an employer could repudiate an 8(f) agreement any time before the union had gained the support of a majority of the bargaining unit employees, but, under the "conversion doctrine," the union could, with relative ease, establish that it had become the employees' Section 9(a)

representative.[1] In *Deklewa*, the Board decided that it would "no longer apply the so-called conversion doctrine to 8(f) cases." 282 N.L.R.B. at 1384. The Board further held that, although an 8(f) agreement cannot be repudiated during its term (unless the employees "vote to reject or change their representative"), "[b]eyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative." *Id.* at 1387. Accordingly, "[u]nlike a full 9(a) representative, the 8(f) union enjoys no presumption of majority status on the contract's expiration and cannot picket or strike to compel renewal of an expired agreement or require bargaining for a successor agreement." *Ibid.*[2]

---

[1] See *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260 (1983); *NLRB* v. *Local 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335 (1978); *R.J. Smith Constr. Co.*, 191 N.L.R.B. 693 (1971), enforcement denied *sub nom. Local No. 150, Int'l Union of Operating Eng'rs* v. *NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). Under the conversion doctrine, "[t]he achievement of majority support required no notice, no simultaneous union claim of majority, and no assent by the employer to complete the conversion process." Majority employee support could be established, in litigation before the Board, through such evidentiary factors as "the presence of an enforced union-security clause, actual union membership of a majority of unit employees," or "employee statements and actions that indicate union support." *Deklewa*, 282 N.L.R.B. at 1378.

[2] Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)" of the Act. A union which has been "designated or selected" as a bargaining representative by a majority of the unit employees in accordance with Section 9(a) is entitled to a rebuttable presumption of continued majority status at the expiration of a collective bargaining agreement. Concomitantly, an employer who is party to an agreement with a Section 9(a) union

The Board explained in *Deklewa* that it did not "mean[] to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry." 282 N.L.R.B. at 1387 n.53. Therefore, an 8(f) union may attain the status of a full 9(a) representative and thus be entitled to the "normal presumptions" attendant to 9(a) status, by winning a Board-conducted certification election (*id.* at 1385) or by obtaining voluntary recognition from "the employer of a stable work force where that recognition is based on a clear showing of majority support among the unit employees, *e.g.*, a valid card majority." *Id.* at 1387 n.53.

2. Respondent American Automatic Sprinkler Systems, Inc., (American) makes and installs fire sprinkler systems. Pet. App. 51a. Beginning in 1974, American was a party to successive collective bargaining agreements with petitioner Road Sprinkler Fitters Local Union No. 669, United Association, AFL-CIO, through membership in the National Fire Sprinkler Association (NFSA), a multiemployer bargaining association. *Id.* at 4a.[3] On October 12, 1987, during the term of the 1985 NFSA labor agreement, which was a Section 8(f) agree-

---

may not refuse to bargain with the union following expiration of the contract unless the employer proves either that a majority of the employees no longer support the union or that it has a good faith doubt as to the union's continued majority status. See *NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

[3] American also had a bargaining relationship with Sprinkler Fitters Local Union No. 536, a sister local of petitioner. Pet. App. 4a; Pet. 3 n.2. Local 536 was a party to the proceedings before the Board but not the court of appeals (Pet. App. 1a), and it has not sought this Court's review of the decision of the court of appeals. Therefore, this brief does not discuss the facts relating to Local 536.

ment, petitioner sent a letter to American and its other signatory contractors. C.A. App. 196.[4] The letter explained that the Board's *Deklewa* decision "may throw into question the nature of the relationship between" American and petitioner and requested American to sign an enclosed "form recognition agreement" reflecting petitioner's "status as the exclusive bargaining representative of [American's] sprinkler fitters." *Ibid.* Petitioner also enclosed with the letter a copy of a recent fringe benefit report filed by American, which, petitioner stated, "accurately confirms that all, or nearly all, of [American's] sprinkler fitter employees are members of and represented by [petitioner]." *Ibid.*

On October 14, 1987, American signed the "form recognition agreement" proffered by petitioner. C.A. App. 195. That agreement stated:

> The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO, for purposes of collective bargaining.
>
> The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter

---

[4] Although the 1985 NFSA agreement was not part of the record before the Board in this case, the court of appeals correctly regarded it as an 8(f) agreement. See Pet. App. 22a; *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 730 (11th Cir. 1998) (describing 1985 NFSA contract as a "section 8(f) prehire national agreement"), cert. denied, 119 S. Ct. 795 (1999); *MFP Fire Protection, Inc.* v. *NLRB*, 101 F.3d 1341, 1342 (10th Cir. 1996) (same).

> employees pursuant to Section 9(a) of the National Labor Relations Act.

Ibid.; see also Pet. App. 4a. Petitioner and American later entered into several successor agreements containing similar language. *Id.* at 4a-5a, 32a. Before the expiration of the most recent agreement, American notified petitioner that it was withdrawing from NFSA and wished to bargain independently for future agreements. *Id.* at 5a, 53a. American sent petitioner a proposed new contract that authorized American to operate on a nonunion basis and to subcontract out all of its work. *Id.* at 66a. On August 11, 1994, after several unsuccessful bargaining sessions with petitioner, American unilaterally implemented its proposal and thereafter refused to recognize petitioner as the representative of its employees. *Id.* at 73a-77a.

3. Acting on charges filed by petitioner, the Board's General Counsel issued a complaint alleging, among other things, that American engaged in bad-faith bargaining with petitioner during the 1994 negotiations, in violation of Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). Pet. App. 48a, 51a. The Board, in agreement with the administrative law judge (ALJ), first concluded that petitioner "[is] the [Section] 9(a) representative[] of [American's] journeymen sprinkler fitters and apprentices." *Id.* at 31a; see also *id.* at 85a. The Board based that conclusion on the recognition language in the October 1987 "form recognition agreement" and the later agreements. *Id.* at 32a. The Board noted that it had previously found the same 1987 form recognition agreement sufficient to establish petitioner's Section 9(a) status. *Ibid.* (citing *Triple A Fire Protection, Inc.*, 312 N.L.R.B. 1088 (1993), enforced, 136 F.3d 727 (11th Cir. 1998), cert. denied, 119 S. Ct. 795

(1999)). The Board further noted that, "in any event, [American's] challenge to the 9(a) status of [petitioner] was untimely raised." Pet. App. 33a (citing *Casale Indus., Inc.*, 311 N.L.R.B. 951 (1993)). On the merits, the Board found that American had violated Section 8(a)(5) and ordered it to bargain with petitioner and to "rescind any or all unilateral changes in mandatory subjects of bargaining implemented on and after August 11, 1994." Pet. App. 31a, 44a, 80a, 163a.

4. The court of appeals denied enforcement of the Board's order in relevant part. Pet. App. 1a-29a.[5] The court upheld, as a "defensible" construction of the Act, the Board's decision in *Deklewa* to abandon the conversion doctrine and to conclude that "8(f) unions, like their counterparts in nonconstruction industries, would not be precluded from achieving 9(a) status through either a Board-certified election or voluntary recognition based upon a clear showing of majority support." *Id.* at 17a. Because "the Board does not argue that [petitioner] attained 9(a) status through a certified election," the relevant question, in the court's view, was whether petitioner "satisfied the requirements for attaining such exclusive representative status through voluntary recognition." *Id.* at 19a. The court explained that "both the Board and the reviewing courts have required the union's unequivocal demand for, and the employer's unequivocal grant of, voluntary recognition as the employees' collective-bargaining representative based on the union's contemporaneous showing of majority employee support." *Id.* at 21a (internal quotation marks omitted).

---

[5] The court of appeals enforced other elements of the Board's order, see Pet. App. 3a, 29a, and that aspect of the court of appeals' decision is not at issue in this Court.

Applying that principle, the court rejected, as unreasonable, the Board's "finding of an effective voluntary recognition of [petitioner's] 9(a) status." Pet. App. 22a. The court concluded that the fringe benefits report proffered by petitioner in support of its demand that American sign the October 1987 form recognition agreement did not "suffice to satisfy the requirement of a contemporaneous showing of majority support." That was so because "the parties' 8(f) contract included a standard union security clause requiring employees, as a condition of employment, to join the union within seven days of being hired." *Ibid.* The court noted that, in *Deklewa*, the Board "not only recognized the unreliability of union membership as a proxy for union support where a [union] security clause is in effect, but in fact based its decision to abandon the conversion doctrine in part on the 'highly questionable' nature of just such an inference." *Id.* at 23a.

The court of appeals also addressed the Board's conclusion that American's "challenge to [petitioner's] 9(a) status is time-barred because it occurs more than six months after voluntary recognition was granted." Pet. App. 19a n.6. The court concluded that "we do not believe that section 10(b) [of the Act, 29 U.S.C. 160(b),] can reasonably be interpreted to prohibit American, the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective voluntary recognition that is the basis of the Board's complaint." *Id.* at 21a n.6.

ARGUMENT

1. Petitioner asks this Court to decide whether the six month statute of limitations in Section 10(b) of the Act, 29 U.S.C. 160(b), applies when an employer in the construction industry seeks to defend against unfair labor practice charges by challenging the validity of a Section 9(a) voluntary recognition agreement. See Pet. i (Question 1), 10-22. That question, however, is not presented by this case, because the court of appeals held that petitioner and American had a Section 8(f) agreement, not a Section 9(a) agreement.

Section 10(b) provides, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. 160(b). In *Local Lodge 1424, IAM* v. *NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960), a case arising outside the construction industry, this Court held that a collective bargaining agreement, lawful on its face, could not be found unlawful because it was entered into with a minority union, when the charge of illegality was filed more than six months after the contract was executed. *Id.* at 417-419.

The Board and the courts have applied Section 10(b) and its underlying policies to preclude employers in the construction industry from raising, more than six months after the event, defensive claims that the union lacked majority employee support at the time the parties entered into a Section 9(a) bargaining relationship through voluntary recognition. See, *e.g.*, *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 737 (11th Cir. 1998) ("after achieving full section 9(a) status," union was "entitled to full membership in section 9(a) status, including the application of section 10(b)," to bar

employer's challenge to union's majority status at time of voluntary recognition), cert. denied, 119 S. Ct. 795 (1999); *Casale Indus., Inc.*, 311 N.L.R.B. 951, 953 (1993) ("if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition").

The Board has recognized, however, that Section 10(b) does not preclude an inquiry into whether a union had an 8(f) relationship rather than a 9(a) relationship. See *Brannan Sand & Gravel Co.*, 289 N.L.R.B. 977, 979 (1988) ("Section 10(b) as construed in [*Bryan Manufacturing*] does not preclude finding that a construction industry bargaining relationship, whatever its age, is not a 9(a) relationship" but rather an 8(f) relationship); *Deklewa*, 282 N.L.R.B. at 1387 (status of 8(f) union "as the employees' representative is subject to challenge at any time"). Moreover, "[u]nder *Deklewa*, the Board presumes that parties in the construction industry intend their relationship to be an 8(f) relationship," see *Casale*, 311 N.L.R.B. at 952, and the party claiming that Section 9(a) status has been attained bears the burden of overcoming that presumption, *Deklewa*, 282 N.L.R.B. at 1385 n.41 (party "asserting the existence of a 9(a) relationship [must] prove it").

In this case, the Board first concluded that petitioner's presumptive 8(f) status had been overcome and that a 9(a) bargaining relationship had been established and then applied the six month limitations period reflected in Section 10(b) to bar American's challenge to petitioner's majority status. See Pet. App. 32a-33a. The court of appeals, however, concluded that petitioner had only a Section 8(f) relationship with American. See *id.* at 22a-24a. Because petitioner had only 8(f)

status, the court concluded, American had no obligation to bargain with petitioner upon the expiration of the 8(f) agreement. *Id.* at 28a.

Accordingly, the court did not need to reach the issue on which petitioner seeks this Court's review: whether, had petitioner established that it enjoyed a 9(a) relationship with American, petitioner would have been entitled to invoke Section 10(b) against a challenge to its majority status at the time of voluntary recognition. Indeed, the court stated that it was deciding "only * * * whether the Board's conclusions in *Deklewa* as to the means by which an 8(f) union can attain 9(a) status * * * are permissible." Pet. App. 14a n.4.

Petitioner (Pet. 19-20) would have this Court read the court of appeals' opinion broadly as having concluded that Section 10(b) does not apply to defensive charges of unfair labor practices when employers and unions have entered into 9(a) bargaining relationships in the construction industry. Such a conclusion would be questionable.[6] As discussed above, however, the court's decision can properly be read as having decided only that Section 10(b) does not bar inquiry into whether a bargaining relationship in the construction

---

[6] It may be an unfair labor practice in the construction industry (as in other industries) for a union and an employer to enter into an agreement that purports to confer Section 9(a) status upon a union that does not represent a majority of the bargaining unit employees. Cf. *Hovey Elec., Inc.*, 328 N.L.R.B. No. 35 (Apr. 30, 1999) (rejecting, on factual grounds, complaint predicated on theory that granting unwarranted 9(a) status to construction union constitutes unlawful support and assistance in violation of Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2)); see also 29 U.S.C. 158(f) (authorizing employer in construction industry to enter into agreement with minority union that is "not established, maintained, or assisted by any action defined in [Section 8(a)] * * * as an unfair labor practice").

industry is an 8(f) or a 9(a) relationship. Therefore, review by this Court of the issue framed by petitioner—whether Section 10(b) applies when there *is* a 9(a) bargaining relationship in the construction industry—should await a case in which it is clear that the court of appeals was required to reach and actually decided that issue.

2. For similar reasons, petitioner is incorrect in contending (Pet. i (Question 1), 11, 16-17) that the decision of the court of appeals in this case conflicts with the decisions of the Eleventh Circuit in *NLRB* v. *Triple A Fire Protection, Inc.*, *supra*, and the Tenth Circuit in *MFP Fire Protection, Inc.* v. *NLRB*, 101 F.3d 1341 (1996). In both of those cases, unlike in this case, the courts of appeals upheld the Board's finding that the parties had attained a 9(a) bargaining relationship.

In *Triple A*, the employer "[did] not in its brief on appeal challenge the Board's finding that the conversion to full Section 9(a) status was achieved" by petitioner. 136 F.3d at 735. Moreover, the court found that, on the particular facts of that case, the Board had satisfied "the *Deklewa* standard that a 'voluntary recognition . . . [be] based on a clear showing of majority support.'" *Ibid.*[7] Accordingly, the court agreed with the Board that, "after achieving full section 9(a) status," petitioner was "entitled to * * * the application of section 10(b)" to bar the employer's challenge to its majority status based on its claim that

---

[7] Because the employer in *Triple A* had only eight employees, including the owner and his son, and petitioner had asserted that all eight were union members, the court found that "the Board could reasonably conclude that [the owner] would have actually verified and known that a clear majority of the employees had designated [petitioner] as their exclusive bargaining representative." 136 F.3d at 735.

the employees were coerced to join the union. *Id.* at 737. In this case, by contrast, American challenged the Board's finding that petitioner enjoyed a 9(a) bargaining relationship with American, and the court sustained American's challenge. See Pet. App. 22a-24a. Given the court's finding that petitioner had only an 8(f) relationship with American, there is no conflict over the application of Section 10(b) between the court's decision in this case and the Eleventh Circuit's decision in *Triple A*.

In *MFP*, the Tenth Circuit accepted the Board's finding that petitioner had attained Section 9(a) status because it concluded on equitable grounds that the employer had waited too long to challenge petitioner's representative status. The court held that "the Board did not err in concluding that the passage of six and one-half years after the expiration of the six-month period allowed for protest, during which health and welfare and pension payments were paid by the employer, barred the employer from retrospectively asserting the absence of a § 9(a) relationship." 101 F.3d at 1344. The court in *MFP* did not cite Section 10(b) and did not address whether (much less hold that) Section 10(b) bars inquiry into whether a union has Section 8(f) or Section 9(a) status.[8] Unlike the Tenth Circuit in

---

[8] Although petitioner states (Pet. 11 n.9) that the Tenth Circuit's decision in *MFP* "followed" that court's earlier decision in *NLRB* v. *Viola Industries-Elevator Division, Inc.*, 979 F.2d 1384 (1992), petitioner does not contend that the decision in this case conflicts with *Viola Industries*. In any event, the *MFP* court did not refer to or cite *Viola Industries*, which involved the question whether Section 10(b) applies to an employer's defensive claim that the union unlawfully coerced it into signing an 8(f) agreement. See 979 F.2d at 1387. The present case does not involve, and the

MFP, the court of appeals in this case did not address any equitable preclusion theory and rejected the Board's determination that petitioner had established 9(a) status.

3. The only question actually presented by this case is whether the court of appeals was correct in its conclusion, contrary to that of the Board, that petitioner never attained Section 9(a) status. Although petitioner contends (Pet. i (Question 2), 22-27) that the court erred, the court's conclusion raises no issue of general importance that warrants this Court's review because it turns on the interpretation of a particular labor agreement in light of the law at the time that the agreement was made.

Petitioner takes issue (Pet. 23) with the view of the court of appeals (see Pet. App. 22a) that a "contemporaneous evidentiary proffer of majority union support among unit employees is required" for an 8(f) union to obtain voluntary 9(a) recognition from an employer. Recent Board decisions support petitioner's contrary view that the validity of an employer recognition agreement instead turns on whether the union "was, *in fact*, the chosen representative of a majority of the employees in an appropriate bargaining unit." *Ibid.*[9] This

---

court of appeals here did not address, the application of Section 10(b) to an unlawful coercion claim.

[9] See, *e.g.*, *Oklahoma Installation Co.*, 325 N.L.R.B. No. 140, slip op. at 2 (May 14, 1998) (clarifying that contractual language, standing alone, may be sufficient to establish a 9(a) bargaining relationship between a union and a construction-industry employer although "additional evidence of [the union's] majority status" would be "a relevant factor"), application for enforcement filed, No. 98-9524 (10th Cir. July 1, 1998); *Triple C Maintenance, Inc.*, 327 N.L.R.B. No. 15, slip op. at 1 n.1, 4 (Oct. 30, 1998) (finding a 9(a) bargaining relationship established in construction industry by a

Court has explained, however, that a labor agreement "must be read * * * in the light of the law relating to it when made." *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956). The court of appeals was therefore not unwarranted in turning to *Deklewa*, which had just been decided at the time petitioner and American entered into the October 1987 agreement, as the source of law by which to evaluate the parties' bargaining relationship. That is particularly so because petitioner's correspondence with American made clear that petitioner sought the October 1987 agreement in reaction to *Deklewa*, under which American would have been free to repudiate its 8(f) relationship with petitioner upon the expiration of the then-extant NFSA collective bargaining agreement. See pp. 3, 5, *supra*.

The court of appeals also was not unreasonable in concluding that *Deklewa* requires an 8(f) union to base a request for voluntary 9(a) recognition on a contemporaneous showing of majority support (Pet. App. 21a) because *Deklewa* itself and its immediate progeny use those terms. See *Deklewa*, 282 N.L.R.B. at 1387 n.53; *J&R Tile, Inc.*, 291 N.L.R.B. 1034, 1036 (1988) ("Since *Deklewa* * * * a party may prove the existence of a 9(a) relationship either through a Board representation election, or a union's express demand for, and an employer's voluntary grant of, recognition to the union as the bargaining representative based on a contemporaneous showing of union support among a majority of the employees in an appropriate unit."); *Brannan Sand & Gravel Co.*, 289 N.L.R.B. at 980 (describing

---

recognition clause that "recites * * * that the Union has shown majority status"), application for enforcement filed, No. 99-9500 (10th Cir. Jan. 19, 1999); *Decorative Floors, Inc.*, 315 N.L.R.B. 188 (1994) (similar holding).

"traditional means of proving 9(a) status" under *Deklewa* and progeny as "a Board conducted election or recognition based on a contemporaneous showing of majority support for the union").[10]

Petitioner further contends (Pet. 24) that the court of appeals erred in concluding that "the existence of a background union security clause is * * * a basis for invalidating a union showing of interest based on the bargaining unit employee union membership." The court's contrary view is not unwarranted, however, judged in light of the state of the law in October 1987, when petitioner made its showing of support. The court rejected petitioner's contemporaneous showing of employee support because its proffer involved the same type of evidence that *Deklewa* deemed an unreliable indicator of actual employee union support, *i.e.*, evidence that a majority of American's employees were members of petitioner pursuant to a seven day union security clause in the parties' 8(f) agreement. See Pet. App. 19a-24a. As the court observed (*id.* at 23a), in *Deklewa*, the Board, explaining why it had decided to abandon the conversion doctrine, seemed to conclude that union membership under a union security clause was not a sufficiently accurate indicator of employee support for the union; rather, such evidence was a "highly questionable factual foundation" upon which to base a conclusion that the union had attained majority 9(a) status, since "[a] union security clause operates to compel new employees to join the union because union membership is the price for obtaining a job." *Deklewa*, 282 N.L.R.B. at 1384 (quoting *Precision Striping, Inc.*

---

[10] The contrary authority cited by petitioner (Pet. 23 n.14) either predates *Deklewa* or does not involve the construction industry.

v. *NLRB*, 642 F.2d 1144, 1148 (9th Cir. 1981) (internal quotation marks omitted)). See also *J&R Tile, Inc.*, 291 N.L.R.B. 1034, 1037 (1988) ("that employees are union members," even in "a right-to-work state where union membership is voluntary," is "not dispositive of the status of the collective-bargaining agreement"). That rationale may no longer be valid because of subsequent developments in the law, but the court of appeals did not address the potential effect of those developments.[11]

In sum, the court's ruling that petitioner failed to establish that it had attained a 9(a) relationship with American turns on an interpretation of the October 1987 agreement in light of the law at the time. The law respecting the requirements for establishing a 9(a) relationship in the construction industry is undergoing further development. Thus, the court of appeals' decision does not raise an issue of sufficient ongoing importance to warrant review by this Court.[12]

---

[11] Those developments include *California Saw & Knife Works*, 320 N.L.R.B. 224, 235 & n.57 (1995) (requiring unions to inform newly hired employees, when presenting them with union membership application forms pursuant to a union security clause, that they have a right under *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), "to be and remain nonmembers" of the union), enforced *sub nom. IAM & Aerospace Workers* v. *NLRB*, 133 F.3d 1012 (7th Cir.), cert. denied, 119 S. Ct. 47 (1998), and *United Paperworkers Int'l Union (Weyerhaeuser Paper Co.)*, 320 N.L.R.B. 349, 349-350 (1995) (establishing similar notification requirement for current union members), enforcement denied on other grounds *sub nom. Buzenius* v. *NLRB*, 124 F.3d 788 (6th Cir. 1997), vacated and remanded, 119 S. Ct. 442 (1998).

[12] Petitioner contends (Pet. 25-27) that the court of appeals should have remanded for the Board to determine in the first instance whether petitioner made an adequate contemporaneous showing of majority employee support. Although remand would have been preferable, see *Florida Power & Light Co.* v. *Lorion*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FREDERICK L. FEINSTEIN
General Counsel

LINDA SHER
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

JOHN EMAD ARBAB
Attorney
National Labor Relations Board

AUGUST 1999

---

470 U.S. 729, 744 (1985), it would not have changed the outcome, because the court of appeals had concluded that, under the relevant law, the existence of the union security clause prevented petitioner from relying on union membership to make the requisite showing. Petitioner has not claimed that it made any contemporaneous showing of majority employee support other than the fringe benefit report documenting that a majority of the employees were union members.

Supreme Court, U.S.
FILED
AUG 24 1999
OFFICE OF THE CLERK

No. 98-1986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

ROAD SPRINKLER FITTERS LOCAL UNION NO. 669, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, A.F.L.-C.I.O.,

Petitioner,

V.

AMERICAN AUTOMATIC SPRINKLER SYSTEMS, INC.

AND

NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

PETITIONER'S REPLY BRIEF

WILLIAM W. OSBORNE, JR.,
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD,
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

13 pp

TABLE OF CITED AUTHORITIES

CASES: Page

Brannan Sand & Gravel Co.,
289 NLRB 977 (1988) *5*

Casale Industries, 311 NLRB 951 (1993) 6,7

Florida Power & Light Co. v. Lorion,
470 U.S. 729 (1985) 9

Local Lodge No. 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) . . . . . *passim*

MFP Fire Protection, Inc. v. NLRB,
101 F.3d 1341 (10th Cir. 1996) 2,8

NLRB v. Metropolitan Life Ins. Co.,
380 U.S. 438 (1965) 10

NLRB v. Triple A Fire Protection, Inc.,
136 F.3d 727 (11th Cir. 1998),
cert. denied, 119 S.Ct. 795 (1999) 2,8

South Prairie Const. Co. v. Op. Eng.,
425 U.S. 800 (1976) 10

Triple C Maintenance, Inc.,
327 NLRB No. 15 (1998) 1-2

PETITIONER'S REPLY BRIEF

The briefs in opposition -- most probably out of a want of any colorable alternative -- seek to drown this case and the questions presented by our *certiorari* petition in a sea of obfuscation. But when all is said and done, the following is crystal clear:

- The situation here is a straightforward one. A construction industry employer who has many years before recognized a union as a NLRA § 9(a) exclusive bargaining representative, and has done so in an express unequivocal recognition agreement, refuses to bargain in good faith with that union as required by NLRA § 8(a)(5) and, when charged with that unfair labor practice, seeks to interpose the defense that the underlying § 9(a) recognition was invalid for want of a proper union showing of majority support at the time recognition was granted.

- The decision below, by recognizing that defense, can only encourage this employer tactic and the labor relations instability and complex NLRB and court litigation it entails.

- The NLRB, in a uniform line of cases construing NLRA § 10(b) and this Court's Local Lodge No. 1424 v. NLRB (Bryan Manufacturing), 362 U.S. 411 (1960) decision, has ruled that such delayed counter-attacks on established collective bargaining relationships in the construction industry -- like delayed direct attacks on the relationship in *non*construction industries -- are time barred. E.g., Triple C. Maintenance, Inc., 327 NLRB No. 15

(1998)(citing cases).

- The Tenth Circuit and the Eleventh Circuit have both agreed with this Board rule. NLRB v. Triple A Fire Protection, Inc., 136 F.3d 727(11th Cir. 1998), cert. denied 119 S.Ct. 795 (1999); MFP Fire Protection, Inc. v. NLRB, 101 F.3d 1341 (10th Cir. 1996).

- In direct contrast, the Fourth Circuit rejected the NLRB's ruling that, seven years after the fact, the Employer here was barred by § 10(b) from challenging the validity of its 1987 NLRA § 9(a) recognition agreement and of the Union's status as a majority representative at that time:

> Recent decisions of the Board and of the Tenth and Eleventh Circuits to the contrary notwithstanding, we do not believe that Section 10(b) can reasonably be interpreted to prohibit [the Employer], the party against whom the complaint has been filed, from defending itself by challenging the validity of the evidence of effective recognition that is the basis of the Board's Complaint. [Pet. App. 21a, n.6, emphasis in original].

It was our submission in the *certiorari* petition -- and it is our submission now -- that the paramount purpose of NLRA § 10(b) and this Court's Bryan Manufacturing decision is to bar delayed attacks upon continuing § 9(a) collective bargaining relationships in the construction industry as in all other industries; that the Board rule

endorsed by the Tenth and Eleventh Circuits is faithful to § 10(b) as interpreted in Bryan Manufacturing, while the Fourth Circuit's contrary position with regard to the Bryan Manufacturing rule is not; and that the Court should grant *certiorari* to remedy the sharp disagreement between the circuit courts on this important issue of NLRA law.

Nothing in the Employer's perfunctory opposition or the Board's elaborately convoluted opposition comes close to providing a reasoned response.

I. The Employer's four-page "[r]easons [f]or [d]enying [t]he [w]rit" is a set of a variations of a single theme. The Employer avers that "the dispute which Petitioner would now bring to the Court's docket is itself particularly fact-based," and that, "[e]ven if the Fourth Circuit incorrectly required unnecessary evidence from complaining unions, there is no reason for believing that the unions will not provide the required evidence of majority support..." Emp. Br. in Op. 15.

That is to both misstate the ruling below and to ignore the NLRA § 10(b) rule and its rationale. The Fourth Circuit, after extended discussion, rejected the position of the NLRB and the Eleventh and Tenth Circuits that, as a matter of law, § 10(b) precludes review of the validity of the Union's 1987 majority showing in the context of the Employer's subsequent 1994 refusal to bargain unfair labor practice case. Pet. App. 19a-21a, n.6. Moreover, the Employer's facile assurance that the Fourth Circuit's error in this regard is as nothing since "the required evidence," while many years old, is "easily" provided is an assurance Congress *rejected* in terms in enacting § 10(b). Congress's purpose was to preclude "litigation over past events 'after

records have been destroyed, witnesses have gone elsewhere, and recollections of the event have become dim and confused.'" Bryan Manufacturing, 362 U.S. at 419 (quoting H.R. Rep. No. 248, 80th Cong., 1st Sess., p.40).

II. While the Board labels its brief as one "in opposition" to the *certiorari* petition, that submission is, in truth, one that steadfastly refuses to treat, or take any position on, the questions presented in the petition. It is perhaps most to the point that the Board does not contest our showing (i) that the first question presented as we state it is an important and recurring NLRA question; (ii) that the Board's answer to that question endorsed by the Tenth and Eleventh Circuits is correct; or (iii) that the contrary answer we ascribe to the Fourth Circuit is wrong. Given Board counsels' deep knowledge and long experience, this silence can not be inadvertent. Thus, the fair inference -- albeit a negative one -- is that the Board recognizes that the first question we present *is* certworthy and that the Board has no cognizable reasons to offer the Court against reviewing and deciding that question now rather than to "await" another case and another day. NLRB Br. in Op. 12.

Against that background, and having the need to provide some explanation for not petitioning for *certiorari* itself, what Board counsel do argue is that the first question stated in the *certiorari* petition "is not presented by this case, because the court of appeals held that petitioner and American had a Section 8(f) agreement, not a Section 9(a) agreement," and because "the Board has recognized... that Section 10(b) does not preclude an inquiry into whether a union had an 8(f) relationship rather than a 9(a) relationship." NLRB Br. in Op. 9, 10. We readily concede that such a court of appeals holding, if made, would not

generate a certworthy question. But the Fourth Circuit's decision here rests on no such basis. And, Board counsel's attempt to make it appear otherwise conflates two legal doctrines the Board decisions are careful to keep separate and distinct.

The key to deciphering what the Board opposition brief works to confuse is that a construction industry employer can offer either one of two distinct responses to a charge that, on the expiration of a collective bargaining agreement, the employer refused to bargain in good faith with a union representative of his employees: First, that the union has an NLRA § 8(f) representative status -- viz. a status resting on a prehire recognition without a showing of majority employee support -- and that under the Board's *Deklewa* doctrine, the employer has no NLRA § 8(a)(5) obligation to bargain with the union. Second, that while the union claims to enjoy a § 9(a) representative status -- viz. a status that rests on a recognition based on majority employee support -- the union did not in fact have, or show, majority employee support at the time of its recognition as a § 9(a) representative and that its lack of majority at that earlier time invalidates its recognition and excuses the later employer refusal to bargain.

The first of these responses is sound as a matter of Board law and, since it goes to the union's *current* status at the time of the employer refusal to bargain, raises no § 10(b) timeliness questions whatsoever, as the Board decisions recognize. E.g., Brannan Sand & Gravel Co., 289 NLRB 977 (1988). The second response, in contrast, is, in all its operational respects, identical to the NLRA § 8(a)(2) charge attacking a long-past § 9(a) recognition that Bryan Manufacturing holds is time barred. And the Board law is

that, by a parity of reasoning, such an employer response to a § 8(a)(5) charge is time-barred as well. The Board spelled all this out in its leading Casale Industries, 311 NLRB 951 (1993) decision and did so with special attention to the dispositive difference between § 8(a)(5)/§ 8(f) refusal to bargain cases and § 8(a)(5) / § 9(a) cases:

> In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined.
>
> These same principles would be applicable in the construction industry. In *Deklewa*, the Board said that unions in the construction industry should not be treated less favorably than those in nonconstruction industries. As shown above, parties in construction industries, who have established and maintained a stable Section 9 relationship, are entitled to no less protection. Accordingly, if a construction industry employer extends 9(a) recognition to a union, and 6 months elapse without a charge or petition, the Board should not entertain a claim that majority status was lacking at the time of recognition. 211 NLRB at 953.

And in distinguishing between § 9(a) and § 8(f) cases for §

10(b) purposes, the Board noted:

> Brannan Sand & Gravel Co., ... does not require a contrary result. There was no showing in that case that the parties intended a 9(a) relationship. Rather, the General Counsel argued, unsuccessfully, that the Board should presume that pre-1959 relationships were 9(a) relationships. By contrast, in the instant case, there is a showing that the parties intended a 9(a) relationship. [Id. at n.18].

There is no excuse for Board counsel to treat these two classes of cases as one for the purpose of the opposition brief here.

This case turned on the second employer response just outlined and only that response. The Employer sought to defend its refusal to bargain by attacking the validity of its earlier express § 9(a) recognition agreement. American Automatic Br. to the Fourth Circuit, 16. And, the Fourth Circuit sustained just that defense by permitting the Employer to defend its 1994 refusal to bargain in good faith "by challenging the validity of the evidence of effective recognition" of the Union in 1987. Pet. App. 21a., n.6.

The short of the matter is that, contrary to the Board's opposition brief, the Fourth Circuit *did* reach the issue on which petitioner seeks review -- whether "petitioner [was] entitled to invoke Section 10(b) against a challenge to its majority status at the time of voluntary [§ 9(a)] recognition" -- and the Fourth Circuit decided that issue contrary to the Board decisions endorsed by the Tenth and Eleventh

Circuits. *Compare* Bd. Br. in Op. 11. And, while Board counsel seek to portray this issue as one and the same with the issue of a union's § 8(f) status at the time of an employer's refusal to bargain, the two are conceptually distinct as the Board decisions demonstrate.

Board counsel's attempt to make the circuit conflict recognized by the Fourth Circuit itself disappear by referring to Triple A Fire Protection and MFP Fire Protection as cases, unlike this case, "[where] the courts of appeals upheld the Board's finding that the parties had attained a 9(a) bargaining relationship," Bd Br. in Op. 12, rests on their misstatement of the Fourth Circuit's decision just discussed and on their erroneous equation of a "§ 8(f) status" response to a refusal to bargain charge and an "invalid initial § 9(a) recognition" response to such a charge.

Indeed, at an earlier point the Board opposition brief highlights the conflict by summarizing Triple A Fire Protection as holding that "'after achieving full section 9(a) status,' the union was 'entitled to full membership in section 9(a) status, including the application of section 10(b), to bar employer's challenge to union's majority status at time of voluntary recognition.'" Bd. Br. in Op. 9-10. That holding is, of course, directly contrary to the Fourth Circuit's holding here. The later lawyerly quibbles at Bd. Br. in Op., pp. 12-14, do not begin to show otherwise. *See also* Supplemental NLRA Br. in Op. in Triple A Fire Protection, Inc. v. NLRB, No. 98-551, at p.2 ("The court [in American Automatic] rejected the Board's contention that consideration of ... evidence [of the union's majority status at the time of voluntary § 9(a) recognition] was barred by the six-month limitations period prescribed by Section 10(b) of the Act. 29 U.S.C. 10(b).")

III. Our *certiorari* petition presents a second, contingent question which would be reached only if the first question we present is answered in the negative, and which we acknowledge is not a certworthy question standing on its own -- "Whether the Fourth Circuit erred in determining for itself in the first instance that an NLRA § 9(a) recognition agreement is invalid on the ground that, in the Court of Appeal's judgment, the union's proffer to the employer showing majority support in 1987 was an inadequate showing in that regard." Pet. i.

The Board opposition brief's response on this question is an exquisite exercise in equivocation. In text, Board counsel essay a new art form -- the *post hoc* re-rationalization and defense of a court of appeals decision, adverse to the underlying Board decision, as one that is "not unwarranted" in its approach, as "not unreasonable" in its reading of selected Board decisions that Board counsel recognize are not authoritative, and, again, as "not unwarranted" in its ultimate legal conclusions. *See* Bd. Br. in Op. 14-17. We are far from clear as to the significance to be attached to the point that a free-wheeling court of appeals' exercise in NLRA lawmaking is "not unreasonable" or "not unwarranted." But what is clear *is* that none of this represents the *Board's* position on the merits, and none of it provides any basis for the conclusion that the court of appeals decision is correct.

Indeed, the only direct response to our showing in support of the second question presented is tucked away in the Board opposition brief's final footnote:

> Although [the] remand [petitioner argues is required] would have been preferable, see

> Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985), it would not have changed the outcome, because the court of appeals had concluded that, under [NLRA] law, the existence of the union security clause prevented petitioner from relying on union membership to make the requisite showing. [Bd. Br. in Op. 17-18, n.12.]

That response is wrong as a matter of administrative law and of labor law.

In the former regard, what this Court said in South Prairie Const. Co. v. Op. Eng., 425 U.S. 800, 805 (1976) (quoting NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 444 (1965)) is directly to the point: "[F]or [the appellate] court to take upon itself the initial determination of this [NLRA] issue was 'incompatible with the orderly function of the process of judicial review.'"

In the latter regard, the Fourth Circuit's ruling on the governing law is not dispositive because, as Board counsel recognize, "[r]ecent Board decisions support petitioner's contrary view that the validity of an employer recognition agreement instead turns on whether the union 'was, *in fact*, the chosen representative of a majority of the employees in an appropriate bargaining unit.' " Bd. Br. in Op. 14, quoting Pet. 23, emphasis in orginal.

CONCLUSION

For the reasons stated above, and in the petition, a writ of certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Respectfully submitted

WILLIAM W. OSBORNE, JR.
(Counsel of Record)
MARGUERITE GRAF
One Thomas Circle, N.W.
Suite 1150
Washington, D.C. 20005
(202) 955-3800

LAURENCE GOLD
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036